Pan American Grain Co., Inc., and Pan American Grain Manufacturing Co., Inc. *and* Congreso De Uniones Industriales De Puerto Rico. Cases 24–CA–9138, 24–CA–9144–2, 24–CA–9161, 24–CA–9216, 24–CA–9227, 24–CA–9350, 24–CA–9390, and 24–CA–9447

October 26, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND MEISBURG

On April 12, 2004, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

1. We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing its February 27, 2002 layoff of 15 striking employees without giving the Union adequate notice and a reasonable opportunity to bargain. The Respondent contends that it provided the Union with adequate notice of its intention to lay off employees when it informed the Union, during collective-bargaining negotiations in 2001, that it planned to continue staff reductions in the future consistent with increased efficiency. As the judge found, however, the Respondent's general statements concerning potential future work force reductions were not sufficiently specific to provide the Union with a reasonable opportunity to bargain over the Respondent's decision to implement the February 27 layoffs. See, e.g., *Gannett Co.,* 333 NLRB 355, 357 (2001) (holding that, to be adequate under the Act, "[t]he prior notice must afford the union a reasonable opportunity to evaluate the proposals and present counter proposals before implementing [the] change").

We reject the Respondent's contention that the management-rights clause contained in the parties' collective-bargaining agreement constituted a waiver by the Union of its right to bargain over the Respondent's decision to lay off employees and over the effects of those layoffs. Even if we were to assume that the parties' contract contained such a waiver, it is well established that "the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intention to the contrary." *Paul Mueller Co.,* 332 NLRB 312, 313 (2000) (quoting *Ironton Publications*, 321 NLRB 1048 (1996)). The parties' collective-bargaining agreement expired in November 2000, over a year before the layoffs at issue here, and there is no evidence that the parties intended any alleged waiver contained therein to continue in effect after the contract's expiration. Accordingly, the Respondent cannot rely on any provisions of the expired collective-bargaining agreement to justify its failure to provide the Union with notice and an opportunity to bargain over the layoff decision and the effects of that decision.[2]

2. The Respondent contends that the judge erred in recommending a full backpay remedy, rather than the limited remedy described in *Transmarine Navigation Corp.,* 170 NLRB 389 (1968). We disagree.

In *Bridon Cordage, Inc.,* 329 NLRB 258, 259 fn. 11 (1999), the Board explained the nature of the two types of remedies as follows:

> Where, as here, the evidence establishes that a layoff was the direct result of a decision over which an employer has no bargaining obligation, the Board has provided the more limited *Transmarine* "effects" remedy. This limited remedy is distinguishable from those cases where the layoff decision was a separate and independent employer decision and not the direct result of an earlier, nonbargainable decision. In such cases, a full backpay and reinstatement remedy for the layoffs is ordered.

Id. (internal citations omitted). Here, we have found that the Respondent's decision to lay off employees was a mandatory subject of bargaining, and that the Respondent violated Section 8(a)(5) and (1) by failing to satisfy its obligation to bargain both over the decision and its effects. Accordingly, we find that the full backpay and reinstatement remedy is appropriate.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent's exceptions were limited to challenging the judge's finding of an 8(a)(5) and (1) violation for implementing the February 27, 2002 layoffs without giving the Union notice and an opportunity to bargain; the judge's recommendation of a reinstatement and full backpay remedy; and the judge's finding that the Union's first unconditional offer to return to work occurred on July 10, 2002. No exceptions were filed to the remainder of the judge's decision.

[2] Members Meisburg and Schaumber note that, had the Respondent established a past practice of implementing substantial layoffs under circumstances similar to those presented at the time of the February 27, 2002 layoff, they might view the case differently.

3. Finally, we find merit in the Respondent's exception to the judge's finding that the strikers made an unconditional offer to return to work on July 10, 2002. Accordingly, we amend the judge's decision and recommended order to reflect our finding that the first unconditional offer to return to work was made on August 5, 2002.

Consistent with the Respondent's exception, which was conceded by the General Counsel in its answering brief, we find that the Union's offer to return to work on July 10, 2002, was not unequivocally unconditional. The Union's July 10 letter stated that, "We *reiterate* that the employees are available to work without conditions." (Emphasis added.) The Union's prior offer to return to work indicated that "the employees are available to immediately return to work under the same conditions already negotiated." Furthermore, in the July 10 letter containing the offer to return to work, the Union continued to demand that the Respondent abide by the allegedly agreed-upon conditions. This ambiguity, combined with Figueroa's testimony at the hearing suggesting that the July 10 offer to return to work was not, in fact, unconditional, supports our finding that the Union's first unconditional offer to return to work was made on August 5, 2002, instead of on July 10, 2002.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that Pan American Grain Co., Inc., and Pan American Grain Manufacturing Co., Inc., San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(e).

"(e) Treat the former strikers as persons who have remained employees since the start of the strike and provide them with reinstatement to their previous positions, or substantially equivalent positions, that have or will become available subsequent to the unconditional offer to return to work on August 5, 2002."

2. Substitute the attached notice for that of the administrative law judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminatorily refuse to consider Domingo Garcia's January 2002 request for leave because he engaged in protected activity by participating in a strike.

WE WILL NOT discontinue medical plan payments for Jose Rossner Figueroa and Alberto Ortiz Serrano because employees engaged in protected activity by striking.

WE WILL NOT lay off unit employees without first giving adequate notice of our intention to do so to the Union and affording the Union an opportunity to bargain in good faith over the layoff and its effects.

WE WILL NOT discriminatorily reduce the wages of the following individuals because they engaged in a strike or other protected activity: Ramon Mojica-Santiago; Angel Granado-Ortiz; Cesar Gonzalez-Ocasio; Luis Marrero Ramos; Armando Torres-Garay; Hector Figueroa-Martinez; Domingo Garcia; Ruben Baez-Garcia; Marcelo Franco Villegas; Daniel Castro Rafa; Jorge Ortiz-Tavarez; Alberto Franco-Mateo; Ernesto Martinez-Martinez; Miguel Maldonado Molina; Policarpio Gonzalez Martinez; Daniel Cruz Suarez; Carlos Fernandez Centeno; Miguel Mercedez Sanchez; Luis Montanez Cintron; Genaro Ortiz Alvarez; Omar Maysonet Merced; Pedro Reyes Vargas; Isaias Rivera Rodriguez; Edwin Roman Herrera; Andres Agosto Flores; Ramon Alicea Garcia; Mariano Pagan Cruz; Tony Melendez Pacheco; Heriberto Olivero Negron; Bill Montes Rodriguez; Nelson Sandoval Leon; Carlos de los Santos Robles; William Gomez Narvaez; Geovanni Perez Guadalupe; Ismael Rivera Guadalupe; Ismael Rivera Delgado; Vincente Martinez Canario; Angel Medina Vargas; Alberto Ortiz Serrano; Ivan Vazquez Muniz; and Jose Rossner Figueroa.

WE WILL NOT treat the individuals listed above as new hires or deny them reinstatement to their prestrike positions or substantially equivalent positions when such positions become available.

WE WILL NOT refuse the Union's request for a statement of the names and positions of employees at our Amelia, Corujo, Muelle, and Anexo Romana facilities, or unreasonably delay the provision of information relevant to the Union's bargaining responsibilities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL consider Domingo Garcia's January 2002 request for leave and provide him with backpay for any paid leave that he requested and for which he had accrued the necessary benefit.

WE WILL, on request, bargain with the Union concerning the decision to lay off employees on February 27, 2002, and the effects of that decision.

WE WILL reinstate and make whole the employees laid off on February 27, 2002, for loss of pay and other employment benefits suffered as a result of our unlawful conduct.

WE WILL treat the individuals who engaged in the strike that was initiated on January 8, 2002, as persons who have remained employees since the start of the strike and provide them with reinstatement to their previous positions or substantially equivalent positions, that have or will become available subsequent to the unconditional offer to return to work on August 5, 2002.

WE WILL make the individuals who engaged in the strike that was initiated on January 8, 2002, whole for any loss of earnings and/or other benefits that they suffered as a result of the discriminatory reduction in their wages and the unlawful denial of reinstatement.

WE WILL immediately furnish the Union with the names of all employees working for us at the Amelia, Corujo, Muelle, and Anexo Romano facilities, and will state the specific position (e.g., welder, electrician, mechanic, pellet mill operator, batcher, mixer) held by each employee, as requested by the Union in its letter of November 27, 2002.

WE WILL, at the request of the Union, furnish the Union in a timely fashion with any information that is relevant for purposes of collective bargaining.

PAN AMERICAN GRAIN CO., INC., AND PAN AMERICAN GRAIN MANUFACTURING CO., INC.

Miguel A. Nieves-Mojica, Esq. and *Marisol Ramos, Esq*., for the General Counsel.

Ruperto Robles, Esq. and *Rafael J. Lopez Rivera, Esq.,* of San Juan, Puerto Rico, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in San Juan, Puerto Rico, on 32 days from November 13, 2002, to December 4, 2003. The case arises out of eight charges filed by Congresso de Uniones Industriales de Puerto Rico (the Union) against Pan American Grain Manufacturing Co., Inc., and Pan American Grain Co. (the Respondent). The Regional Director for Region 24 of the National Labor Relations Board issued the complaint in Case 24–CA–9227 (complaint I) on May 31, 2002, and the consolidated complaint in Cases 24–CA–9138, 24–CA–9161, and 24–CA–9216, on July 31, 2002. On October 22, 2002, the Regional Director issued a complaint (complaint II), which consolidated Cases 24–CA–9138, 24–CA–9161, and 24–CA–9216 with Cases 24–CA–9144-2 and 24–CA–9350. On October 31, 2002, the Regional Director issued an order consolidating the cases included in complaint I and complaint II, but did not issue a new complaint integrating the allegations for all six cases. On December 31, 2002, the Regional Director issued a complaint (complaint III) in Case 24–CA–9390 and, on January 31, 2003, a complaint in Case 24–CA–9447 (complaint IV). On April 11, 2003, upon motion by the General Counsel, I consolidated Cases 24–CA–9390 and 24–CA–9447 with the prior six cases.[1]

The complaint[2] alleges that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) when it terminated the employment of a total of 41 bargaining unit employees in February and April 2002, withheld accrued vacation benefits from one unit employee, and stopped making payments to the medical plans of two unit employees who were on medical leave, all because the employees joined and/or assisted the Union and engaged in concerted activities, including a strike. The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) by discontinuing its payments to the medical plans of the two employees without first bargaining with the Union. The complaint also alleges that the Respondent unilaterally changed employees' existing terms or conditions of employment in violation of Section 8(a)(5) and (1) by beginning to require its employees to sign for receipt of Saturday work schedules, and violated Section 8(a)(3) and (1) by suspending six employees who refused to comply with the requirement. The complaint alleges that the Respondent dealt directly with unit employees in violation of Section 8(a)(5) and (1) by soliciting employees to accept the Respondent's proposal for a collective-bargaining agreement and by seeking a response from employees to the proposal. The complaint alleges that the Respondent violated Section 8(a)(1) by making threatening statements and by disparaging the Union.

The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) when it reinstated the terminated employees because it: did not offer them their previous positions or substan-

[1] The Union filed the charge in Case 24–CA–9138 on January 10, 2002, the charge in Case 24–CA–9144–2 on May 16, the charge in Case 24–CA–9161 on January 24, the charge in Case 24–CA–9216 on March 14, the charge in Case 24–CA–9227 on March 26, and the charge in Case 24–CA–9350 on August 2, 2002. The Union filed amended charges in Cases 24–CA–9227, 24–CA–9216, 24–CA–9138, and 24–CA–9144–2, on April 26, May 16, June 13, and October 2, 2002, respectively. The Union filed a second amended charge in Case 24–CA–9227 on May 10, 2002. When the trial in this matter opened it concerned only these six cases. The trial initially closed on December 12, 2002. Subsequently, on April 11, 2003, I granted the General Counsel's motion to consolidate the cases that had already been heard with two closely related cases, Cases 24–CA–9390 and 24–CA–9447. Pursuant to Sec. 102.35(8) of the Board's Rules and Regulations, the record in the prior cases was reopened. On June 16, 2003, the Board upheld my decision to consolidate the cases.

[2] By "the complaint" I refer to all the complaints consolidated in this proceeding. Specific complaints will be identified by the use of roman numerals, as indicated above.

tially equivalent positions; imposed more onerous and rigorous working conditions on them; assigned them to less desirable work shifts; and reduced their wages. In addition, the complaint alleges that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to comply with the Union's request to furnish the names and positions occupied by its employees at various facilities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent,[3] I make the following

FINDINGS OF FACT[4]

I. JURISDICTION

The Respondent,[5] a Puerto Rico Corporation, has its central office in Bo. Amelia, Guaynabo, Puerto Rico (the Arroz Rico facility), and other places of business in the Amelia Industrial Park in Guaynabo, Puerto Rico (the Amelia facility), and the Corujo Industrial Park in Bayamon, Puerto Rico (the Corujo facility). The Respondent is engaged in the importation, manufacture and sale of grains, animal feed and related products, and in the processing of rice. During the 12-month period preceding the issuance of complaint I, the Respondent, in conducting its business operations, purchased and received at the Arroz Rico facility goods valued in excess of $50,000, directly from points outside the Commonwealth of Puerto Rico. During the 12-month periods preceding the issuance of complaints II, III, and IV, the Respondent, in conducting its business operations, purchased and received at its Corujo and Amelia facilities goods valued in excess of $50,000, directly from points outside the Commonwealth of Puerto Rico. I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent manufactures animal feed at its Amelia and Corujo facilities, and processes rice at its Arroz Rico facility.[6] The Respondent also maintains a warehouse facility in an area referred to as "the docks" or "Muelle," and a weighing station known as "Anexo Romana." The Union has been the collective-bargaining representative of production and maintenance employees at the Amelia and Corujo facilities since 1986, and at the Arroz Rico facility since 1992 or 1993. Production and maintenance employees at the docks and Anexo Romana are also covered by one of these collective-bargaining agreements. At all relevant times, Jose Gonzalez (Gonzalez) has been the president of the Respondent, and Jose Figueroa (J. Figueroa) has been the president of the Union. The last collective-bargaining agreement (CBA or agreement) covering unit employees at the Amelia and Corujo facilities expired on November 21, 2000, and the one at the Arroz Rico facility expired on March 4, 2002. As of the time of trial, successor agreements had not been executed for these facilities.

On January 8, 2002, unit employees at the Respondent's Amelia and Corujo facilities initiated a strike. On February 27, 2002, during the strike, the Respondent notified 15 of the strikers that they were being laid off. On April 16, 2002, while the strike continued, the Respondent notified 26 unit employees (all the remaining strikers plus two unit employees on long-term sick leave) that they had been permanently replaced.

B. Signatures Required on Saturday Schedules

The Respondent's unit employees at the Corujo facility generally work from Monday to Friday each week, but sometimes the Respondent calls upon them to work on a Saturday. Prior to December 17, 2001, the supervisors coordinated the Saturday schedules with employees when such work was necessary. The Respondent would communicate the company's needs to employees who then, with the participation of the union steward, decided which employees would perform the Saturday work. A schedule was not presented to employees, nor were they required

[3] The General Counsel and the Respondent had submitted briefs regarding Cases 24–CA–9138, 24–CA–9144-2, 24–CA–9161, 24–CA–9216, 24–CA–9227, and 24–CA–9350, before I issued my order reopening the record and consolidating those cases with Cases 24–CA–9390 and 24–CA–9447. After the completion of the hearing on the consolidated cases, the General Counsel and the Respondent again filed briefs. The initial briefs are referred to as GC Br. (I) and R. Br. (I). The briefs filed after the additional two cases were added, and the record reopened (GC Br. (II) and R. Br. (II)).

After the initial briefs were filed, and before the record was reopened, the Respondent submitted a reply brief, along with a motion for leave to file it. In its motion, the Respondent argues that it should be permitted to file the reply brief because the General Counsel's brief distorted the record and offered a mistaken reading of prior precedent. The General Counsel opposes the Respondent's motion. After considering the matter, I conclude that the Respondent has not shown that its reply brief does anything more than expand upon some of the Respondent's contentions regarding the facts and law applicable to this case. Therefore, I deny the Respondent's motion for leave to file its reply brief.

The Respondent has also made a motion for leave to file a translation of R. Exh. 26 after the original deadline for submission of translations. That motion is granted.

[4] The court reporter did not paginate the entire transcript in this case consecutively. Rather the transcript pages for the November 2002 trial days were numbered 1 to 505, and the pages for trial days from December 2002 till the trial closed in December 2003 were numbered 1 to 3868. Citations in this decision refer to the November 2002 transcript as "Tr. (I)," and to the December 2002 to December 2003 transcript as "Tr. (II)," followed, in both cases, by the page number assigned by the court reporter.

[5] The General Counsel alleges that Pan American Grain Co., Inc., and Pan American Grain Manufacturing Co., Inc. constitute a single-integrated business enterprise. The Respondent neither admits nor denies this, but does admit that Pan American Grain Co., Inc., and Pan American Grain Manufacturing Co., Inc. have: been affiliated business enterprises with common officers, ownership, directors, management, and supervision; formulated and administered a common labor policy affecting employees of the operations; shared common premises and facilities; have provided services for and made sales to each other; interchanged personnel with each other; and, held themselves out to public as a single-integrated business enterprise. I find that Pan American Grain Co., Inc., and Pan American Grain Manufacturing Co., Inc., constitute a single-integrated business enterprise.

[6] The Respondent refers to its animal feed operation as "Pan American Grain Company," and to its rice operation by the slightly different name, "Pan American Grain Manufacturing Company."

to sign anything memorializing the schedule; however, a note regarding which employees were working which Saturday shifts was created for the information of supervisors.

The Respondent deviated from this practice beginning on December 17, 2001. That day it presented employees at the Corujo facility with a memorandum from Osvaldo Marin (maintenance manager) setting forth a work schedule for Saturday, December 22. The memorandum assigned particular employees to work on each of three shifts and also stated that "[n]on-compliance with the above could carry the imposition of severe disciplinary measures." Before this memorandum was distributed, Fausto Didonna (supervisor) and Andres Agosto (shop steward and member of union bargaining committee) had, through the usual method, arrived at a different schedule for the same Saturday. Agosto told Marin that he did not agree with the new schedule. On December 18, 2001, Didonna directed Agosto to place his signature on the memorandum from Marin, and stated that Gerardo Curet (operations manager) had directed that this be done. Agosto refused because, in his words, he "wasn't going to accept what was written down." Didonna stated that the signature was only to acknowledge receipt of the memorandum. Agosto still refused to sign, stating that if the Respondent wanted him to acknowledge receipt, then a separate receipt form should have been provided. Didonna also directed Nelson Sandoval, a deputy steward, to sign the schedule, but like Agosto, Sandoval refused.[7]

In letters dated December 21, Curet admonished Agosto and Sandoval for refusing to sign for receipt of the Marin memorandum and stated that the next "similar act" would result in a 3-day unpaid suspension. After Agosto received this letter, Agosto and Arturo Figueroa (A. Figueroa)[8] called Curet. Curet, Agosto, and A. Figueroa worked together to arrive at an overtime schedule that covered Saturday, December 29, 2001, and Saturday, January 5, 2002. On December 24, 2001, Curet and A. Figueroa signed this agreed-to schedule. The schedule was posted on the bulletin board, but on that same day Marin gave Agosto and Sandoval another schedule for December 29 that differed from the one that had just been agreed to by Curet, Agosto, and A. Figueroa. Agosto and Sandoval refused to sign the schedule presented by Marin, and Agosto subsequently asked Curet why another schedule had been distributed that was different from the one they had agreed on. Curet told Agosto that the Company would follow the agreed on schedule, not the one presented by Marin. By letter dated January 4, 2002, Curet suspended Agosto and Sandoval for 3 days without pay for "refusing to sign the acknowledgment receipt."

The record shows that in many instances the Respondent had employees sign to acknowledge receipt of documents handed to them by supervisors and agents of the Company. For example, Agosto signed an admonishment letter from the Respondent to acknowledge receipt of that admonishment, not to show acceptance of what was stated in the letter. The record also includes examples of documents that the Respondent distributed to employees that were not signed by the recipients. Indeed, while Luis Juarbe (director of human resources) testified that requiring employees to acknowledge receipt of any document provided to them has been the Respondent's practice since he came to the Company in 1999, he conceded that supervisors sometimes failed to follow that practice. The Respondent did not show that it had ever disciplined an employee for failing to sign a document prior to December 2001. In fact, Juarbe testified that he knew of no such cases. By the same token, the General Counsel did not show that there were past incidents when, as here, employees had refused to sign documents to acknowledge receipt after the supervisor expressly instructed them to do so. The Respondent's employee manual sets forth the discipline applicable to various offenses and does not list failure to sign for receipt of work schedules among the offenses subject to discipline, and contains no policy requiring that documents be signed. The manual does set forth discipline for an employee's "refus[al] to work reasonable overtime."

C. Contract Negotiations

During 2001, the Respondent and the Union engaged in negotiations for a successor to the agreement covering the Amelia and Corujo facilities. According to both Gonzalez and J. Figueroa, the parties agreed to terms for a successor CBA by late 2001. However, the parties never executed a successor CBA. The Union presented the Respondent with a CBA that, according to the Union, embodied the terms the parties had agreed to, but the Respondent declined to sign it. On January 8, 2002, the same day that the unit employees went on strike, the Respondent provided a proposed CBA to the Union. This proposed CBA was different from the one presented by the Union, but the Respondent contends that it, rather than the Union's version, embodies the terms the parties had agreed to. The Union did not agree that the Respondent's version reflected the agreement reached by the parties, and refused to sign it. In a letter dated February 12, J. Figueroa also stated that there were eight "unfair practices," mostly involving individual employees, that the parties had to "attend to" or "discuss" "before attending to the signing of the [CBA]." A number of these issues had not been raised by the Union prior to the start of the strike. At a meeting between the parties on February 22, 2002, Alberto Fernandez, a representative of the Respondent, stated that if the Union was conditioning signing the CBA on the Respondent's agreement regarding the eight issues "collateral" to the CBA, there was nothing further to discuss. Subsequent to this, at a point prior to April 16, 2002, the Respondent notified the Union that it believed impasse had been reached. The Union denied that there was an impasse.

[7] I do not credit Sandoval's testimony that he was told to sign the document in order to show his commitment to comply with the schedule. This is contrary to Agosto's account of how Didonna presented the signature requirement, and also with the letter and memorandum from the Respondent documenting the event. I did not find Sandoval a very credible witness based on his demeanor and testimony. Sandoval testified that the Respondent had never asked him to sign documents in the past, Tr. (I) 394, but the record included multiple examples of documents from the Respondent that Sandoval had signed, Tr. (I) 395–396, 398, 401, 412. When Sandoval was confronted with these documents he, at first, responded evasively, but eventually conceded that the Respondent often had him sign documents. Id.

[8] Arturo Figueroa is a union official who was on the bargaining committee. He is also the father of J. Figueroa, the union president.

In February 2002, the parties began negotiations for a successor to a separate agreement, this one for the Arroz Rico facility. That agreement was set to expire on March 4, 2002. The Respondent posted a copy of the Union's proposal on a bulletin board at the facility. Then the Respondent prepared a written version of its own proposed CBA and presented it to the Union on March 21 or 22. In the cover letter accompanying the proposal Gonzalez asked that the Union "consider favorably this offer that is extremely reasonable for everyone," given the "economic reality of the enterprise." The Respondent, within a day or two after obtaining a return receipt indicating that its CBA proposal had been delivered to the Union, distributed the proposal to employees at the Arroz Rico plant. The proposal materials were distributed to employees individually during a change in shift. When employee Jose Colon received the materials he asked Antonio Jacobs, plant manager, if it was the Respondent's proposal, and Jacobs stated that it was Respondent's "best and only offer." Jacobs told another employee, Francisco Aponte, that the proposal was the "most reasonable . . . for . . . employees." In at least some instances, Jacobs told employees to study and evaluate the proposal so that they would know what it consisted of when the matter was discussed by the bargaining committee or in an assembly.

D. The Strike at the Amelia and Corujo Facilities

The Union initiated a strike at the Amelia and Corujo facilities on January 8, 2002. On the day the strike began, Gonzalez issued a memorandum to the Union and the strikers, and included with it a proposed CBA which he said was "the agreement that the company is willing to sign because it was so agreed." In the memorandum, Gonzalez went on to state that the CBA was the "best agreement of this industry," and accused the Union of causing the strike by injecting new issues into the bargaining process after the parties had reached a full agreement. In the memorandum, Gonzalez also stated that unless the Union signed the agreement by 1 p.m. that day, he would conclude that "its contents were not correct" and that the parties would return to the bargaining table to analyze all the positions of the parties. He warned that the costs to the Respondent resulting from the strike would be taken into account during subsequent negotiations and that the Respondent would "not financially affect other employees because of expenses incurred by [the strikers]." He also listed a number of companies that, according to him, had shut down because of "strikes of this nature."

E. Gonzalez Meets with Betancourt and Maldonado

Juan Betancourt and Noel Maldonado are truckdrivers who, prior to January 2002, regularly transported materials for the Respondent. Although they are not part of the bargaining unit, both ceased performing work for the Respondent when the strike began. According to Betancourt, he told the Respondent that the reason he ceased this work was because of concern about his personal safety. On January 8 or 9, 2002, Betancourt was in the area where the striking employees were picketing when he received a call on his cell phone from Gonzalez. Gonzalez asked Betancourt to come to his office. Betancourt, who had helped to mediate a strike at the Respondent's facility in 1996, agreed to meet with Gonzalez. On the way to Gonzalez office, Betancourt invited Maldonado to accompany him and the two proceeded to the office together.

When Betancourt and Maldonado arrived at Gonzalez' office, Gonzalez asked them whether they were on the "side" of the strikers or of the company. Betancourt and Maldonado informed Gonzalez that they were on the Company's side. Gonzalez said that he had told the strikers to return to work by 1 p.m., and that if they did not do so they would "find themselves out of the company, they wouldn't return." He stated that if the employees did not return by 1 p.m. he "would rather close the company" than reach an agreement with them. Gonzalez told them that he could make more money by converting the facility into offices. He stated that he had $8 million set aside for a project at the Arroz Rico facility, but that now he "might possibly not carry . . . on with it." Gonzalez called the strikers "jerks" and "sons of bitches," and said he would not be concerned if it cost him $2 million to rid the company of them. Betancourt responded that the strike could be settled if Gonzalez "just gave in a little and the Union representatives or strikers also gave in a little." Betancourt stated that many of the strikers had been with the Respondent from its inception, and opined that the success of the enterprise was the result of having a good president and good employees. Gonzalez replied that he would not reach any deal with J. Figueroa. He said he would wait for the strikers to run out of money and then would laugh as the strikers lost their homes and cars, and found that their wives were unfaithful to them. He punctuated these comments by thrusting his hips in what Maldonado understood as a sexually suggestive gesture.[9] Gon-

[9] I have credited Betancourt's and Maldonado's generally consistent testimony regarding statements made by Gonzalez during the meeting. Neither Betancourt nor Maldonado is a member of the Union, or has otherwise been shown to be biased in favor of the Union. Indeed, it is undisputed that Betancourt told Gonzalez that they were on the company's "side" in the dispute. Gonzalez himself stated that Betancourt had been instrumental in mediating a strike between the Company and the bargaining unit employees in 1996. Although Betancourt did not work during the strike, he made clear to the Respondent that this was because of concerns over his personal safety. Betancourt and Maldonado both testified in a confident and certain matter about the meeting. Gonzalez' denials, to the extent that they can be called that, were not convincing to me. He testified that he had not made any of the "immoral" statements he is accused of, but when the Respondent's counsel gave him an opportunity to deny the specific statements Betancourt and Maldonado testified to, Gonzalez answers were evasive. In many instances, rather than directly deny that he made the statements, he testified that the actions he allegedly threatened to take were inconsistent with actions he actually was taking, or that his alleged comments were contrary to his personality. See generally Tr. (II) 463–468. For example, when asked about his alleged statement that he would wait for the strikers to spend all their money, that the strikers' wives would be unfaithful and that he would laugh, Gonzalez responded that these statements were contrary to the way he treated employees, but he did not directly deny making the threat. Tr. (II) 465–466. When asked about the allegation that he called the strikers "sons of bitches" and "jerks," Gonzalez responded that he had known the employees for a long time, treated them as friends, and characterized the alleged statements as "not me." Tr. (II) 466–467.

zalez urged Betancourt to talk to J. Figueroa and "get some sense into him."[10]

After Betancourt and Maldonado left their meeting with Gonzalez, they returned to the area where the strikers were. The strikers asked Betancourt to recount what Gonzalez had said, but Betancourt replied that he would discuss the matter only with J. Figueroa.[11] When J. Figueroa arrived, Betancourt and he went to a restaurant, away from the striking employees, and Betancourt related what Gonzalez had said.

F. Status of Betancourt and Maldonado

The parties disagree about whether Betancourt and Maldonado are employees of the Respondent for purposes of Section 2(3) of the Act, or whether they are independent contractors. The record shows that the Respondent does not provide either Betancourt or Maldonado with identification cards or uniforms. The Respondent generally pays truckdrivers per load according to the weight of the load, not based on an hourly wage, or a salary. The Respondent does not deduct social security, income tax, or unemployment compensation premiums from their pay, and it does not provide them with benefits such as a health plan, sick leave, vacation pay, or overtime, which are provided to its production employees. Betancourt and Maldonado receive no training from the Respondent, pay their own fines for traffic violations, and obtain necessary trucking permits on their own. The Respondent does not require Betancourt and Maldonado to work exclusively for the Company; however, in practice, both drivers generally use all of their work time providing services to the Respondent. Betancourt and Maldonado are not required by the Respondent to appear for work every day, or at a particular time, and after they complete a delivery it is up to them to decide whether to return to the Respondent and seek additional work that day. Maldonado has increased his revenues from the Respondent by operating a total of four trucks and hiring three drivers to work for him. Maldonado, not the Respondent, makes deductions from the pay of these drivers for such things as income tax, social security, and the State insurance fund, and provides fringe benefits such as Christmas bonuses, sick leave, and vacation leave.

Betancourt and Maldonado own their trucks and the Respondent does not require them to place the Respondent's name or logo on the trucks. The Respondent has no involvement in the purchase, maintenance, or repair of the trucks, and does not require that only certain models of truck be used. The Respondent does not pay for fuel for the trucks and does not provide overnight parking. In order to carry materials for the Respondent, Betancourt's and Maldonado's trucks are outfitted with certain additional equipment. An entity called the Environmental Quality Board requires that these modifications be made on trucks carrying the types of materials that the truckdrivers transport for the Respondent. In Betancourt's case, he bought the necessary equipment and the Respondent assisted in its installation, but in Maldonado's case the Respondent had no involvement at all in making the modifications. Due to concerns about contamination, there are also certain types of materials that Betancourt and Maldonado are prohibited from transporting in their trucks if they also wish to transport materials for the Respondent. The Environmental Quality Board imposes these anticontamination restrictions on the Respondent, which in turn requires compliance from truckdrivers who provide services to the company.

Betancourt and Maldonado generally carry materials between facilities owned by the Respondent. Once the material is loaded into the truck, they take it to a destination specified by the Respondent, but are free to choose their own route to that destination. They do not collect money on behalf of the Respondent.

G. Garcia Denied Vacation Pay

Domingo Garcia is a welder who began working for the Respondent in 1993. On a form dated January 7, 2002, Garcia requested leave for a vacation to commence on January 14, 2002. Garcia had previously discussed the matter with Curet (operations manager), who gave his approval. Garcia and his supervisor both signed the request. After Garcia submitted the vacation request, the strike commenced on January 8 and Garcia participated in the strike. Garcia was not paid for the vacation that was to begin on January 14. Juarbe testified that when Garcia's leave request arrived at the human resources department, "the employees had already gone on strike. So it was not processed."

Employees Garcia, Agosto, and Jose Rossner Figueroa (Rossner) all testified that in their experience Curet was the official who approved employees' vacation leave. However, Luis Juarbe, the Respondent's human resources director, explained that authorization was not final until after the human resources department verified that the employee had accrued the number of vacation days sought. Consistent with Juarbe's statement, the Respondent's form for requesting vacation leave has the following signature line: "Approved by: _____, Human Resources Director." According to the applicable collective-bargaining agreement, employees "will accrue vacations with full pay . . . as long as they have worked one (100) hundred hours or more per month."

Garcia stated he had always received vacation pay if Curet approved it, but he conceded that he did not know whether further review had followed Curet's approval. Similarly, Rossner testified that he did not know if the leave request had to be signed by an official from human resources. I find, based on the record in this case, that vacation leave was not authorized until after the human resources department confirmed that the employee had accrued the leave, and an official of the human resources department signed the request. Garcia's leave form in this instance was signed by himself and a supervisor, and his request had previously been approved by Curet, but no official from the human resources department signed the form or approved the request.

[10] The General Counsel suggests that Gonzalez asked Betancourt to talk to employees about what they had discussed. However, the record only establishes that Gonzalez asked Betancourt to talk with Union President J. Figueroa, who is not an employee of the Respondent.

[11] In its initial brief, the General Counsel asserts that Betancourt testified that after the meeting with Gonzalez he rejoined the picketing strikers and "talked to them about the things that had transpired." However, the citations relied on by the General Counsel do not support the contention that Betancourt and Maldonado told the strikers anything about the threats made by Gonzalez. To the contrary, Betancourt clearly testified that when the strikers asked him what Gonzalez said, his response was that he would discuss the matter with J. Figueroa. Tr. (I) 136–137, 151. The record does not show that Maldonado discussed Gonzalez' comments with any of the employees.

H. Respondent Discontinues Medical Insurance Payments for Rossner and Ortiz

Rossner and Alberto Ortiz Serrano (Ortiz) were on unpaid medical leave at the time the strike began on January 8, 2002.[12] Rossner, an employee of the Respondent for approximately 20 years, began his unpaid medical leave in September 2000. Ortiz, an employee of the Respondent for approximately 11 years began his medical leave in 2001, most likely in about December of that year. By letters dated January 10, 2002, the Respondent notified Rossner and Ortiz that the Respondent "w[ould] not continue making its contribution to the Health Plan." The letters informed Rossner and Ortiz that they could subscribe to "extended coverage under COBRA" by notifying the Respondent within 60 days and paying premiums of $234.90.[13]

Pursuant to contract and practice, the Respondent permits the bargaining unit employees an unpaid medical leave of up to 2 years. During that 2-year period, the Respondent continues to make payments for the employee's health plan. The health plan that covers the bargaining unit employees is a group plan chosen by the Union. The Respondent's only responsibility regarding this health plan is to make a monetary contribution for the plan's premiums.

The Respondent did not introduce any evidence that the provider for the health plan had informed the company that the plan had been, or soon would be, canceled, or that premium payments could no longer be made for Rossner and Ortiz.

I. Layoff and Replacement

Before the Union made an unconditional offer to return to work at the Amelia and Corujo facilities, the Respondent informed the bargaining unit employees that their services were no longer needed. First, in a letter dated February 27, 2002, the Respondent notified 15 of the striking employees at the Amelia and Corujo facilities that they were being laid off effective immediately. In a February 27 letter to the Union, Juarbe stated that these individuals were being laid off as a result of the following "positions" being "permanently eliminated": "A-Skilled-Truck Loader/Utility; A-Skilled-Buhler Pellet Mill Operator; A-Skilled-Pellet Mill Operator; A-Skilled-Electrician; A-Skilled-Welder; A-Skilled-Mechanic; Welder four (4) position; A-Skilled-Cotton Container Unloader; A-Skilled-Mechanic; A-Skilled-Sprout Pellet Mill Operator; B-Skilled-Sprout Mill Operator; B-Skilled-Pellet Mill Operator." In a letter dated April 16, 2002, the Respondent notified the remaining 26 striking employees at the Amelia and Corujo facilities that they were being permanently replaced as of 5 p.m. that day.

Regarding the February layoff, Gonzalez' uncontradicted testimony was that in 1996 the Respondent embarked on a project to modernize its facilities, and that this project significantly reduced the Respondent's staffing needs and resulted in one or two layoffs each year since its inception. The modernization project continued in late 2001 and early 2002, and the new equipment was so efficient that the Respondent was able to shut down one of two production lines at the Amelia facility and still meet the demand for its products. In addition, the Respondent's sales dipped substantially when the strike started, further decreasing the Respondent's staffing needs in the early months of 2002. In February 2002, Gonzalez met with Curet (operations manager) and Eduardo Fernandez (treasurer/budget) to discuss the Respondent's budget and plant operations. They concluded that the Respondent required fewer employees and would implement a layoff.[14] Gonzalez felt it was appropriate to immediately notify the Union that the 15 employees had been selected for layoff, even though those employees were on strike and therefore were not providing services to the company. His understanding was that striking employees were not generally entitled to unemployment compensation, food stamps, and other government benefits, but that by informing the Union that 15 of the strikers had been laid off, the Company would enable the affected employees to obtain such assistance. On February 27, Gonzalez instructed Juarbe to prepare a letter informing the Union that the 15 employees were being laid off. Juarbe, prepared the letter, dated February 27, in which he stated that the layoff was "due to economic reasons and as a result of a substantial decrease in production and sales." The decision about which employees were selected for the layoff was made in conformity with procedures in the CBA. At the time of this layoff, the Respondent was in the midst of what Gonzalez described as "a major expansion," but the record does not show whether this expansion had created, or would create, jobs comparable to those being eliminated as the result of modernization of the Amelia and Corujo facilities.

Regarding the replacement of the 26 unit employees on April 16, the record shows the following. After the strike commenced, the Respondent obtained replacement workers through a temporary agency. Initially, the Respondent did not hire the replacements as its own employees. Instead the replacements, while providing services to the Respondent, were directly employed by the temporary agency. This arrangement continued through April 16, 2002. On April 17, 2002, the Respondent hired the replacement workers as employees of the Company. On that day the replacement workers completed probationary period employment contracts with the Respondent that stated, "On this date I have been hired to carry out work . . . subject to a probationary period." Twenty-five individuals completed these probationary period contracts on April 17. At the time that the replacements began the probationary periods, the Respondent informed them

[12] At trial, the Respondent introduced a document from the State human resources department, dated August 27, 2001, stating that Rossner had no emotional condition. However, the Respondent has not claimed that this document led it to conclude that Rossner was no longer entitled to medical leave. To the contrary, on October 22, 2001, almost 2 months after the State human resources department issued the document, the Respondent's human resources director certified in writing that Rossner was still on sick leave and had been since September 18, 2000. At about the same time, Rossner's physician, Jose Roman, M.D., stated that Rossner would require continuing medical treatment for an indefinite period of time. Dr. Roman stated that Rossner was taking three types of medication and had monthly appointments.

[13] The letters do not state how often this amount would have to be paid.

[14] Gonzalez testified credibly that, during contract negotiations in 2001, he told the union committee that the Respondent planned to further reduce the size of the staff. He stated that the union committee showed no interest in discussing that issue, but rather focused on negotiating the compensation and benefits under a new contract.

they were being offered permanent positions, but had to complete probation.[15] For some of the replacements, the probationary period was 45 days and expired on May 31, 2002, and for others it was 90 days and expired on July 17, 2002. The Respondent issued identification cards to these employees for the first time on April 17, at the start of the probationary period. After receiving the April 16 letter, J. Figueroa wrote to the Respondent to oppose the permanent replacement of unit employees and request a meeting on the matter.

J. Union's Unconditional Offer to Return to Work[16]

The parties subsequently engaged in extensive correspondence regarding the striker's possible return to work, and the substance of this correspondence must be recounted briefly. By letter dated June 26, 2002, A. Figueroa, on behalf of the Union, informed Juarbe that the employees were "available to immediately return to work under the same conditions already negotiated." On July 3, Juarbe responded that the parties had a dispute about what terms they had negotiated for a new collective-bargaining agreement, and asked the Union to state in detail what it meant by "the same conditions already negotiated." By letter dated July 10, A. Figueroa clarified that the employees were "available to work without condition" and that the Union was not requiring that the Respondent accept the Union's proposed CBA as a prerequisite for their return to work. Now Juarbe shifted his stance, no longer claiming the question was one of better defining the Union's offer to return, but rather stating, "As you are aware, [the strikers] were permanently replaced, consequently, there are no vacant positions available at this time." In a letter dated July 18, A. Figueroa contended that the strike was "not an economic one," and requested "the reinstatement, without conditions, of all the unionized employees." In early August, the Union filed a charge alleging that the company had unlawfully refused to reinstate the former strikers despite their unconditional offer to return to work. In a letter to the Respondent, dated August 5, 2002, the Union stated, "We again reiterate to you our reinstatement offer, without employment conditions." When Juarbe responded on August 8, he no longer claimed that there were no vacant positions, but rather stated that reinstatement of the former strikers was contingent on the parties signing a new collective-bargaining agreement. In a separate letter, dated August 13, Juarbe stated that he understood the Union had "desisted" from its position that the employees would not return to work until the resolution of controversies "invol[ving] the particular employees and other issues." Juarbe went on to state that although "the employees have been permanently replaced . . . some vacancies have arisen that we will cover by making the pertinent offer to the employees." The letter concluded, that all the "affected employees" should come to the Respondent's offices 2 days later on August 15, 2002, at 2 p.m., for the purpose of "making a determination about the persons entitled to this, those who are available and/or interested." The Union received this letter at 2:50 p.m. on August 13. In a letter to Juarbe dated August 15, A. Figueroa stated the union president and others were available to meet regarding reinstatement on August 20 at 9:30 a.m. in the Union's offices. In the letter, A. Figueroa also denied that the Union had conditioned its return to work on the resolution of the controversies referred to by Juarbe and stated that "all the workers, which make up the appropriate unit . . . reiterate an unconditional reemployment offer." None of the employees appeared at the Respondent's offices on August 15. On the same day, and apparently before receiving A. Figueroa's letter, Juarbe sent a letter to the Union stating that the Respondent was offering employment to the 15 strikers who it had laid off in February 2002, and inviting them to appear at the company's offices on August 22 at 9 a.m. Juarbe included letters to the 15 laid-off employees stating that "there were some vacant positions for which you can qualify." The Respondent did not inform the Union or the former strikers what type of work was being offered, or what the terms and conditions of employment would be. However, it did inform the employees that if they did not appear "it will be understood that you are not interested in working and waive the rights granted to you by [Puerto Rican law]." A. Figueroa responded with a letter, dated August 20, in which he stated that "all the employees, the 15 discharged employees of February 27, 2002, as well as the ones

[15] Juarbe, the Respondent's human resources director, testified that the replacements were informed they were being hired as permanent employees subject to the completion of a probationary period. The General Counsel questioned Juarbe about a portion of an affidavit he gave to the Board, in which he stated that the replacements were "not told that they were permanent." Tr. (II) 195. Based on other portions of the affidavit, and the testimony of Juarbe, I understand the portion of the affidavit referenced by the General Counsel to mean only that the employees were not notified at the conclusion of their probationary period of the resulting change in their employment status to "permanent" in the sense of no longer being probationary. Tr. (II) 192–196, 278–281, 284–286. I conclude that Juarbe's affidavit is not inconsistent with his testimony that the replacements were informed that the April 17 contracts were for permanent employment subject to the completion of a probationary period.

[16] The Respondent argues that the complaint did not provide it with adequate notice that the General Counsel intended to allege that the Union made an unconditional offer to return to work and that the matter has not been fully and fairly litigated. R. Br. (II) at 26. I reject this contention. There is no requirement that the complaint list all the specific evidence that the General Counsel intends to introduce at trial. See *American Newspaper Publishers Assn. v. NLRB*, 193 F.2d 782, 800 (7th Cir. 1951) ("The Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense."), affd. 345 U.S. 100 (1953), and Board's Rules and Regulations, Rule 102.15 (Complaint "shall contain . . . (b) a clear description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent's agents or other representatives by whom committed.") The complaint in this case alleged that the Respondent violated the act by, inter alia, failing to offer the union members the "positions occupied by them or substantially equivalent positions," and by reducing their wages when they returned to work after the strike." The Respondent not only should have recognized, but clearly did recognize, that the facts relating to the Union's offer to return were relevant to these allegations and were being litigated. Indeed, numerous letters going to the issue of the Union's unconditional offer to return were introduced into evidence and counsel for both the General Counsel and the Respondent elicited testimony regarding the matter. The question of whether the Union made an unconditional offer to return to work was fully and fairly, indeed extensively, litigated, in this proceeding.

you allegedly substituted on April 16, 2002, are interested in working."

On the morning of August 22, the former strikers appeared at the Respondent's offices,[17] along with both J. Figueroa and A. Figueroa. As of that time, the Respondent had not told the former strikers what positions the Company was offering them, what shifts they would be working, or what their pay and other terms and conditions of employment would be. Juarbe testified that the Respondent intended to discuss these matters with the employees once they entered the facility.[18] After the strikers had assembled in front of the facility, Juarbe and Curet came out of the office and approached them. Without preliminary discussion, Juarbe began calling out the names of employees and stated that those whose names he called could enter the facility. J. Figueroa interrupted and told Juarbe that he should not talk directly to the employees, but to J. Figueroa himself as the employees' representative. A. Figueroa told Juarbe that the Respondent had previously been notified by letter that J. Figueroa would be present to represent the former strikers. Juarbe and Curet left for a time, and then returned with Alberto Fernandez, the Respondent's in-house counsel. Juarbe stated that he had looked for a letter requesting that J. Figueroa be permitted to enter the facility, but had not found one. Fernandez directed the employees to enter and Juarbe said that A. Figueroa would be permitted to come in with them, but that J. Figueroa would not be.[19] A. Figueroa said that J. Figueroa, as union president, needed to be present. J. Figueroa thought his presence was necessary so that he could represent the employees when they met with the Respondent about their re-employment. In the end, the Respondent persisted in its refusal to allow J. Figueroa to enter the premises and none of the employees entered without him. J. Figueroa had previously indicated to the Respondent that he was willing to discuss the reemployment of the former strikers with company officials somewhere other than the Respondent's facilities, but the Respondent rejected the Union's request to have the meeting at the Union's facility, ostensibly because of the Respondent's concerns for the safety of its officials.

In a letter to A. Figueroa, dated September 4, Gonzalez stated:

> With regard to the ex-employees that you represent; they opted not to return to work on August 15, 2002, as well as on August 22, 2002. That is resignation from work. The company has accepted this resignation and has offered and it is offering those jobs to other individuals in a permanent manner.

The record shows that the Respondent has subsequently hired at least six new production employees to do bargaining unit work at the Amelia facility[20] where many of the former strikers worked prior to the start of the strike.

K. Former Strikers Return to Work

In a letter dated October 8, the Respondent informed the former strikers and the Union that the Respondent had openings for which they would be considered if they presented themselves for work. The Union and the Respondent corresponded regarding the openings and the Union tried unsuccessfully to arrange a meeting with Gonzalez to discuss the details of re-employment. By letter dated October 26, the Respondent again invited the former strikers to present themselves for possible employment. As with previous letters from the Respondent on the subject, this letter did not state which employees would be rehired, the positions to which they would be assigned, or the terms and conditions of employment. In the letter, the Respondent set a deadline of November 2, for the former strikers to appear. On October 28, J. Figueroa informed the Respondent that all the strikers wanted to return to work, and would appear on October 29 at 8 a.m. to request reinstatement.

On October 29, the former strikers appeared at the Respondent's offices, this time without J. Figueroa. The Respondent interviewed the former strikers and had them complete employment applications. Twenty-five or twenty-six of the former strikers were re-employed that day. The rest of the former strikers who were still interested in working for the Respondent were rehired in early November. Although some of these individuals had worked for the company for as many as 20 years, all were now treated as new employees and required to complete probationary periods. Prior to the strike, the Respondent paid these individuals wages ranging from $6.15 to $9.31 per hour.[21] When they returned to work after the strike, the former strikers were all were paid $5.15 an hour, the lowest wage permitted under the CBA, and one that could only be paid to "new" employees. This wage was well below the minimum the Respondent was permitted to pay nonprobationary employees in both the skilled and

[17] All of the former strikers were present except for Policarpio Gonzalez, who had been excused.

[18] According to Gonzalez, it had been the Respondent's intention on August 22 to offer the 15 previously laid-off individuals employment under the same terms and conditions as they had before the strike. If this was Gonzalez' intention, it was not communicated to the Union as of the time of the August 22 incident.

[19] The Respondent has refused J. Figueroa admittance to its facilities for several years. The Respondent's position is that this exclusion is justified because J. Figueroa's past behavior demonstrates that he is a security risk. In a decision issued on May 23, 2003, Administrative Law Judge George Aleman found, inter alia, that the Respondent's exclusion of J. Figueroa from its facilities violated Sec. 8(a)(5) and (1) of the Act. *Pan American Grain Co., Inc.*, JD–59–03, 2003 WL 21251892 (Division of Judges). The General Counsel and the Respondent have both filed exceptions to elements of Judge Aleman's decision, and these exceptions were pending before the Board as of the date of this decision.

[20] The six employees are: Pedro Bruno, Melvin Diaz, Luis Ledesma, Enrique Maysonet, Jesus Prieto, and Edwin Santana.

[21] My findings regarding the prestrike wage rates of the former strikers are based on a summary exhibit that the General Counsel prepared from information contained in personnel files produced by the Respondent in response to the General Counsel's subpoena. See GC Exh. 89. The Respondent argues that this exhibit should have been excluded as hearsay. R. Br. (II) at 2–3. I am surprised that the Respondent would make this argument since it stated at trial that it did not object to the exhibit as long as certain information pertaining to matters other than wages was stricken from it. That information was stricken from the exhibit at trial, and I did not consider it in making my findings in this proceeding. The Respondent does not contend that any of the wage information contained in this summary of the subpoenaed material was not accurate, much less present any testimony or evidence that it was inaccurate.

unskilled classifications under the expired CBAs. When these "new" employees completed their probationary periods, the Respondent continued to pay them $5.15 an hour, even though the CBA mandates that wage increases of at least $1 an hour will be granted once the probationary period is completed.[22] Since the start of the strike, the Respondent has hired a number of new employees who were not former strikers. All of these nonstrikers were started at wages of at least $5.50 and as much as $7 per hour. Of the employees hired after the start of the strike, only the former strikers were paid the lowest wage stated in the CBA.

After the Union made its unconditional offer to return to work, the Respondent assigned the overwhelming majority of the 40 returning strikers to its Arroz Rico facility, where none of them had been working immediately prior to the strike.[23] During that period, the Respondent hired at least six individuals who had not participated in the strike to perform bargaining unit work at the Amelia facility—the prestrike work location for more than half of the former strikers.

About 11 of the returning strikers were assigned to the same shift as they worked immediately before the strike.[24] Eight others have been assigned to more than one shift since returning, but have worked at least part of the time on their prestrike shift. Both before and after the strike, the majority of the employees at issue were assigned to the day shift, with most of the others assigned to the evening shift. As was the case before the strike, only a small number of the at-issue employees worked on the night shift after the strike. One employee, Carlos Fernandez Centeno, filed a grievance complaining about his post-strike shift assignment. Before the strike Fernandez worked from 7 a.m. to 3 p.m., but after the strike he was assigned to work from 2 to 10:30 p.m.

Almost without exception, the Respondent did not reinstate the former strikers to their prestrike positions. This was true even when there was an opening for that returning striker in his prestrike position.[25] Before the strike, most, if not all, of the at-issue employees were in one of the two "skilled" classifications and held positions that generally required substantial skills. The positions that these individuals had held before the strike included "electrician," "mechanic," "welder," "pellet mill operator," "ingredients receiver/miller," "mixer," "batcher," "heavy equipment operator," "bag filler," "sewer," and "truck loader."[26] By-and-large, the primary duties of these positions required rather limited physical exertion. Many of the employees would operate automated machinery through the use of buttons, pedals, or similar controls, and/or would watch to make sure that the machine was operating properly or producing the expected grade of material. The equipment operated by these employees included both stationary machinery and mobile units such as loaders, and forklifts. In some instances employees were required to look into silos or tanks to monitor the levels of raw material or product. The employees working as mechanics provided preventive maintenance and repaired broken equipment, and those working as welders installed new equipment, mended ruptures in metal tanks, and made other repairs. Electricians repaired and maintained the

[22] Art. XVII of the CBA states: "The new employees will start at $5.15 per hour and after their regular probationary period of ninety (90) days they will then receive the salary according to the classification in which they are performing." The article also sets forth the wages applicable to the various classifications—the lowest of which is $6.15 per hour.

[23] One employee, Alberto Ortiz Serrano, testified that prior to the strike he was working at an annex near the Arroz Rico facility, but the evidence suggests that this was not part of the Amelia facility for purposes of collective bargaining. Another employee, Angel Granado, had worked at the Arroz Rico facility in the year 2000, but it appears he was working at the Amelia facility when the strike commenced.

[24] In this group I have included not only employees who worked precisely the same hours before and after the strike, but also those who worked the same general shift—for example, the "night shift." The record indicates that the Respondent has three shifts: a day shift that usually runs from 7 a.m. to 3 p.m., although in some assignments it starts as early as 5:30 or 6 a.m. and ends earlier than 3 p.m.; an evening shift that starts somewhere between noon and 3 p.m., and ends between 10 p.m. and midnight; and, a night shift that starts between 10 and 11 p.m., and ends between 6 and 7 a.m.

[25] Former striker Omar Maysonet was working as a bag filler immediately before the strike. After the strike, the Respondent assigned Maysonet to a position as a stevedore, at the same time that it assigned former striker Isaias Rivera Rodriguez, who had been a batcher/mixer before the strike, to the bag filler position. Former striker Daniel Cruz Suarez was a forklift operator immediately before the strike. After the strike, the Respondent assigned Cruz to a position as a sewer, at the same time that it assigned former striker Luis Montanez Cintron, who was a batcher/mixer before the strike, to a position as a forklift operator.

[26] The Respondent contends that employees did not work in specific positions and that the company used them to perform whatever tasks it deemed necessary. The Respondent claims that, before the strike, none of the employees were employed in specific positions such as "welder," or "mechanic," or "pellet mill operator," and so on, but only as production employees classified as skilled-a, skilled-b, or unskilled, depending on their level of skill. I reject the Respondent's contention. Not only did the employees who testified provide extensive and mutually corroborative testimony that they had specific positions before the strike, but a number of the Respondent's own officials referred to the former strikers using the same position titles identified by the employees. See, e.g., Tr. (II) 3145 and 3150 (supervisor states that Luis Montanez was a "mixer"), Tr. (II) 3165–3166 (supervisor states that Ruben Baez was an "electrician"), Tr. (II) 3201 (supervisor states that Luis Marrero's position was "mechanic"), Tr. (II) 3302 (maintenance manager states that William Gomez was a "welding mechanic"), Tr. (II) 3358 (maintenance manager states that Policarpio Gonzalez "was the batcher for the second shift"), Tr. (II) 1153 (human resources director admits that Daniel Castro was a "welder"). Under questioning, Juarbe conceded that "the position" of welder existed with the Respondent before the strike. Tr. (II) 1153. The record also contains numerous documents in which the Respondent referred to the positions occupied by employees. For example, a letter from Juarbe, dated February 27, 2002, stated that the Company was laying off employees because a total of 15 "positions" were being eliminated. The letter then enumerated the positions, which included, inter alia, "Welders four (4) positions," "A-Skilled-Electrician," "A-Skilled Welder," "A-Skilled Buhler Pellet Mill Operator," "A-Skilled-Electrician" position," and "A-Skilled Mechanic. GC Exh. 33. The record also includes copies of the identification cards that the Respondent issued to a number of the at-issue employees before the strike, and these identify those workers by the positions of "mechanic" and "welder." GC Exhs. 100, 104, 111, and 114. Other documents created by the Respondent also refer to employees occupying specific positions. See, e.g., GC Exhs. 98 and 99. In light of the record evidence, I consider the Respondent's contention that the employees did not have "positions" before the strike to be preposterous. The fact that the Respondent's officials insisted on pressing this contention continually throughout the hearing does nothing to bolster their credibility.

Respondent's electrical equipment, such as electric motors and magnetic motors. In addition to these duties, the skilled employees were routinely responsible for performing cleaning in their work areas that was incidental to the tasks of their positions. The Respondent would also intermittently call upon these employees to perform duties other than those associated with their specific positions. These duties could sometimes be more demanding from the point of view of physical exertion or working environment or both. Before the strike, some of the employees were required to perform duties: at substantial heights, while exposed to the elements, in confined spaces, around hot machinery, and in the presence of excessive dust and/or fumes. However, during their regular shifts these employees spent most, and in some cases essentially all, of their working time performing the less onerous duties associated with their specific positions.

After the strike, the employees were generally assigned to perform work that involved considerably greater physical demands than the positions they occupied prior to the strike. For example, immediately after the strike at least 12 of the employees were assigned to work full time inside a cement grain silo where they shoveled corn and scraped away corn that had become stuck to the inside walls. This was physically grueling work, in a hot, poorly lit, environment where the air was foul smelling and extremely dusty. The silo was approximately 100 feet high and 50 feet in diameter and the only ventilation was provided through the silo's one small door. The employees were able to work continuously in this environment for no more than 10 to 30 minutes at a time before they would have to exit and recover in the fresh air.[27] A number of the employees credibly testified that they developed health problems as a result of this work. In the past the Respondent had not required its own employees to perform this unpleasant work, but rather had used employees from a temporary help agency.

After working at the silo, the same group of employees was assigned to clean the bilge, or cellar, of a shipping vessel that the Respondent kept at a dock and used as a warehouse. The bilge was between 50-and 100-feet deep and its floor was very muddy. The environment was dusty and there was an unpleasant odor due to the length of time that food material had been stored there. The employees used shovels to pile the food material on top of the water that had collected in the bottom of the bilge. Then they shoveled this material into drums that were removed by a crane. Afterwards they cleaned interior surfaces of the silo using shovels, brooms, screwdrivers, and pressure hoses. At various points, employees would clean with a hose while standing on a metal platform that was hung from a crane and suspended at heights of more than 50 feet over the bilge's bottom. The top of the bilge was mostly open, providing ventilation, but the employees were required to work in some areas associated with the bilge that were poorly ventilated. Cleaning the bilge in this manner was not routine work for the company—it had been performed only once during a 4-year period.

The Respondent eventually assigned most of the returning strikers, including those initially sent to the silo and the bilge, to work on the packing lines at the Arroz Rico facility. A smaller number were assigned to work at the Amelia facility's packing line. The Arroz Rico facility was a clean, relatively dust-free, operation, as compared to the Amelia and Corujo facilities, which were quite dusty. Much of the work at the packing lines was "stevedoring"—i.e., manually taking sacks from an assembly line and placing them on portable platforms or "pallets."[28] The sacks weighed between 20 and about 100 pounds[29] and the work was repetitive and more or less continuous with the exception of scheduled break periods. On some of the production lines the sacks came to the stevedores shortly after a packaging process that involved the application of heat, and a number of the employees found the sacks uncomfortably hot to handle. Other work that was done on these lines included the filling and sewing of the sacks. To fill a sack, the employee placed it empty on a machine that held it in place while the product was poured in. Then the employee let the bag drop onto an assembly line, taking care that it was properly positioned so as not to spill. Another employee then guided the sack through a machine that automatically sewed it closed. On at least some of the packing lines, the employees rotated through the three assignments—filling, sewing, and stevedoring—over the course of the day. After the strike, some of the employees were assigned for a period of time to watch over the curved stretch of a conveyor where bags of product were prone to get stuck. The employees working there would manually move or adjust the bags when there was a problem. Cesar Gonzalez Ocasio, one of the few former strikers who were assigned to the Corujo facility after the strike, was directed to work part of the day as a batcher, the same position he had held prior to the strike at the Amelia facility.

The former strikers consistently testified that they preferred their prestrike work to the work the Respondent assigned them to perform after the strike. In most cases the former strikers stated that they wanted to use the skills, experience and training they had acquired for their prestrike positions. A number also testified that they preferred the physical demands of their prestrike positions because they involved less exertion or were carried out in a less challenging physical environment.

L. Union's Information Request

On August 15, 2002, Juarbe sent letters to 15 of the former strikers, stating that the Respondent had eliminated their positions in February 2002, but was now prepared to offer them work for which they were qualified. In a letter dated August 20, 2002, A. Figueroa responded that the Union rejected the Respondent's claim that the positions had actually been eliminated, and argued that the employees were entitled to reinstatement in their previous positions. In the same letter, A. Figueroa requested information that he said the Union needed "in order for us to prepare" for a meeting with the company regarding the dispute. The request identified five items, only one of which is at issue here. That item read as follows: "We want you to inform us the names, jobs and positions that are

[27] In addition to these brief breaks, the employees generally received the usual breaks available to other employees.

[28] This work is also referred to as "palletizing."

[29] Some of these sacks actually were comprised of many smaller sacks that were packaged together.

held by the employees that you have working at the Amelia, Corujo, Muelle and Anexo Romana plants."

The Respondent's president, Gonzalez, responded to A. Figueroa's request in a letter dated August 23, 2002. In response to the request for the names, jobs and positions of current employees, Gonzalez stated, "I do not have authorization from those persons to disclose their names."

In a letter from J. Figueroa to Gonzalez, dated August 30, J. Figueroa argued that the Respondent was legally required to provide the Union with the names of the employees working at the facilities listed in the request. Subsequently, by letter dated November 27, the Respondent provided the Union with the names and duty stations of the employees. The letter stated that each of the employees worked in "production," but did not state their positions or specific duties. The Respondent had not provided any other information in response to this item in the request as of the time of trial.

M. Complaint Allegations

The complaint alleges that since about December 19, 2001, the Respondent unilaterally changed existing terms or conditions of employment in violation of Section 8(a)(5) and (1) by beginning to require its employees to sign for receipt of Saturday work schedules that stated employees would be subject to discipline for failure to comply with the schedule. In addition, the complaint alleges that the Respondent violated Section 8(a)(3) and (1) on about January 4, 2002, when it suspended six employees who refused to comply with the new requirement.[30] The complaint also alleges that on January 8 or 9, 2002, the Respondent violated Section 8(a)(1) by making threatening statements and by disparaging the Union. The complaint alleges that in January 2002 the Respondent violated Section 8(a)(3) and (1) of the Act by withholding Garcia's vacation benefits and by discontinuing payments for the medical plans of Rossner and Ortiz, because the employees engaged in protected activity. The complaint further alleges that the discontinuation of the medical plan payments for Rossner and Ortiz violated Section 8(a)(5) and (1) because the Respondent did not first bargain with the Union over the change. The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act when it terminated the employment of 15 individuals on about February 27, 2002,[31] and 26 employees on about April 16, 2002,[32] because the employees engaged in protected activity. The complaint also alleges that the terminations violated Section 8(a)(5) and (1) of the Act. The complaint further alleges that since the Respondent reinstated the terminated strikers on or about October 29, 2002,[33] it has discriminated against them in violation of Section 8(a)(3) and (1) by: not offering them the positions they previously occupied or substantially equivalent positions; imposing on them more onerous and rigorous working conditions; assigning them to less desirable work shifts; and, reducing their wages. The complaint alleges that the Respondent dealt directly with unit employees in violation of Section 8(a)(5) and (1) in March and April 2002 by soliciting employees to accept the Respondent's proposal for a collective-bargaining agreement and by seeking a response from employees to the proposal. Finally, the complaint alleges that the Respondent failed to bargain in violation of Section 8(a)(5) and (1) by refusing to comply with the Union's August 20, 2002 information request for the names and positions of the Respondent's employees at Amelia, Corujo, Muelle, and Anexo Romana.

Analysis

Requirement that Employees Sign Saturday Work Schedules

Complaint II alleges that the Respondent violated Section 8(a)(5) and (1) by the following conduct:

> Since about December 19, 2001, Respondent has changed existing terms and conditions of employment by unilaterally, and contrary to past practice, requiring its employees to sign, as acknowledging receipt of the same, a copy of the work schedule for Saturday, December 22, 2001, and Saturday, December 29, 2001, which warned employees that failure to comply with the schedule would subject employees to discipline.

It is not clear whether this allegation is simply that the Respondent unlawfully began requiring employees to sign Saturday/overtime schedules, or whether the allegation is also meant to raise an issue regarding the policy that discipline would attach for failure to work the overtime hours indicated. The General Counsel's arguments at trial and briefs after trial do nothing to clarify this question. Although I consider it dubious that the latter issue was fully and fairly litigated, I will assume for purposes of discussion that it is encompassed by complaint II and was fully litigated.

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally changes the wages, hours, or other terms and conditions of employment of bargaining unit employees without first providing the collective-bargaining representative with notice and a meaningful opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962); *Bryant & Stratton Business Insti-*

[30] The six employees are: Andres Agosto, Ramon Alicea, Nelson Sandoval, Mariano Pagan, Policarpio Gonzalez, and Ernesto Martinez.

[31] The individuals alleged to have been affected by the February 27 action are: are Ramon Mojica-Santiago; Angel Granado-Ortiz; Cesar Gonzalez-Ocasio; Luis Marrero Ramos; Armando Torres-Garay; Hector Figueroa-Martinez; Domingo Garcia; Ruben Baez-Garcia; Marcelo Franco Villegas; Daniel Castro Rafa; Jorge Ortiz-Tavarez; Alberto Franco-Mateo; Ernesto Martinez-Martinez; Miguel Maldonado Molina; and Policarpio Gonzalez Martinez.

[32] The individuals alleged to have been affected by the April 16 action are: Daniel Cruz Suarez; Carlos Fernandez Centeno; Miguel Mercedez Sanchez; Luis Montanez Cintron; Genaro Ortiz Alvarez; Omar Maysonet Merced; Pedro Reyes Vargas; Isaias Rivera Rodriguez; Edwin Roman Herrera; Andres Agosto Flores; Ramon Alicea Garcia; Mariano Pagan Cruz; Tony Melendez Pacheco; Heriberto Olivero Negron; Bill Montes Rodriguez; Nelson Sandoval Leon; Carlos de los Santos Robles; William Gomez Narvaez; Geovanni Perez Guadalupe; Ismael Rivera Guadalupe; Ismael Rivera Delgado; Vincente Martinez Canario; Angel Medina Vargas; Alberto Ortiz Serrano; Ivan Vazquez Muniz; and Jose Rossner Figueroa.

[33] The General Counsel is pursuing these allegations on behalf of all of the former strikers, with the exception of Giovanni Perez Vallez, who refused to return to work for the Respondent. GC Br. (II) at 2 fn. 1.

tute, 321 NLRB 1007 (1996); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); *Associated Services for the Blind*, 299 NLRB 1150 (1990). This is true even if at the time of the change the collective-bargaining agreement between management and the union has expired and a new agreement has not been completed. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). The Board has made clear that in order to constitute a unilateral change that violates the Act, the employer's action must be a material, substantial, and significant change that has a real impact on, or causes a significant detriment to, the employees or their working conditions. *Golden Stevedoring Co*., 335 NLRB 410, 415 (2001) (quoting *Millard Processing Services*, 310 NLRB 421, 425 (1993)); *Outboard Marine Corp.*, 307 NLRB 1333, 1339 (1992), enfd. mem. 9 F.3d 113 (7th Cir. 1993); *UNC Nuclear Industries*, 268 NLRB 841, 847–848 (1984); and *Peerless Food Products*, 236 NLRB 161 (1978).

Regarding the requirement that employees sign the overtime schedules to acknowledge their receipt, the record shows that this was not a material, substantial, and significant change from the Respondent's past practice. The Respondent has a longstanding practice of instructing employees to acknowledge receipt of documents by signing either the document itself or a separate acknowledgment form.[34] The exhibits submitted in this case include an array of documents that employees signed for this purpose prior to the alleged unilateral change. It is not a significant change, or even a change really, for the Respondent to apply this general, facially benign, requirement to documents that were being distributed for the first time, such as the Saturday/overtime schedules.[35] See, e.g., *UNC Nuclear Industries*, supra at 847–848 (oral tests administered to unit employees not an unlawful change where tests were merely an extension of an existing program). The General Counsel does not cite a single case in which imposition of a requirement that employees acknowledge receipt of documents was found to be a substantial enough change in working conditions to trigger the obligation to bargain, much less any case in which the application of an existing requirement of that nature triggered a bargaining obligation simply because the specific document involved was being distributed for the first time. I conclude that the Respondent did not make a unilateral change in violation of Section 8(a)(5) and (1) by applying the existing acknowledgment requirement to the Saturday/overtime schedules.

The General Counsel cites authority for the proposition that a change in an employer's disciplinary system is a mandatory subject of bargaining. However, the General Counsel failed to show the existence of an established past disciplinary practice or understanding regarding overtime assignments that was changed by the Respondent's December 2002 admonition about the consequences of failing to follow the overtime schedules. *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988) (when alleging a unilateral change from an established past practice or understanding, the General Counsel has the burden of demonstrating the existence of the past practice or understanding), *Whirlpool Corp.*, 281 NLRB 17, 22 (1986). What evidence there is in the record indicates that the admonition contained in the December 2002 memorandums was consistent with the Respondent's prior pronouncements on the issue. More specifically, the Respondent's employee manual states that "refusing to work reasonable overtime" is an infraction subject to progressive discipline including suspension and discharge. See *Chicago Tribune Co.*, 304 NLRB 495, 508–509 (1991) (not unlawful unilateral change for employer to announce that employees who refuse to work overtime will be disciplined, where agreement said that employees would work a reasonable amount of overtime), enf. granted in part, denied in part 974 F.2d 933 (7th Cir. 1992).

Similarly, the General Counsel has not shown that the December 2002 memorandum resulted in a change in the way the disciplinary policy regarding refusal to work overtime was actually enforced.[36]

[34] The record shows that supervisors sporadically failed to enforce this policy. Enforcement of an existing rule does not constitute a unilateral change simply because enforcement was somewhat lax or inattentive in the past. *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976).

[35] The record indicates that, in the past, the Respondent had determined who would perform Saturday/overtime work after a process of consultation with union officials and/or employees. The General Counsel does not allege that the Respondent made an unlawful unilateral change by distributing schedules that the Respondent generated without such consultation. As a practical matter, the Respondent did not use the schedules that it created without union/employee input, but rather, as in the past, followed schedules that were arrived at through discussions with the Union and employees.

[36] In its initial brief, the General Counsel also argues that the Respondent unilaterally changed its disciplinary system in violation of Sec. 8(a)(5) and (1) of the Act by initiating a practice of disciplining employees who refused to sign to acknowledge receipt of Saturday/overtime work schedules. This allegation is not encompassed by any reasonable reading of the complaint. Instead, the complaint alleges that the Respondent unilaterally imposed the signing requirement itself, and arguably the requirement that employees comply with the overtime schedule. The General Counsel did not seek to amend the complaint at hearing to include an allegation that the Respondent unilaterally changed its disciplinary policy relative to the requirement that employees sign for receipt of documents, nor did it mention this allegation during its opening argument. I find that this allegation was not fully and fairly litigated and I decline to reach it. *Cibao Meat Products*, 338 NLRB 934, 936 (2003); *Q-1 Motor Express, Inc.*, 308 NLRB 1267, 1268 (1992), enfd. 25 F.3d 473 (7th Cir. 1994), cert. denied 513 U.S. 1080 (1995). At any rate, were I compelled to decide the issue on basis of what evidence there is in this record, I would almost certainly rule in favor of the Respondent. The General Counsel has failed to demonstrate that the Respondent departed from any previously established disciplinary practice or understanding when it suspended employees who refused its instruction to acknowledge receipt of documents. The evidence does show several instances in which a document was not signed by the employee/recipient and yet the recipient was not disciplined. However, it was not shown that in any of those instances the employee refused to sign in the face of a direct order from the Respondent to do so. The evidence showed that supervisors sometimes failed to follow the policy of instructing employees to sign documents that were handed to them. It is one thing when an employee does not acknowledge receipt of a document because the employer neglected to request that he or she do so, and quite another for an employee to refuse

For the reasons discussed above, I conclude that the Respondent did not violate Section 8(a)(5) and (1) by requiring employees to sign to acknowledge receipt of Saturday/overtime schedules, and by warning employees that discipline would result from failure to comply with the schedule. Those allegations should be dismissed.

Complaint II also alleges that on about January 4, 2002, the Respondent discriminatorily suspended employees Andres Agosto, Ramon Alicea, Policarpio Gonzalez, Ernesto Martinez, Mariano Pagan, and Nelson Sandoval, in violation of Section 8(a)(3) and (1) for failure to obey an instruction to sign, and comply with, the Saturday/overtime schedules distributed on December 22 and 29. The General Counsel's sole argument on this score is that discipline imposed pursuant to an unlawful, unilaterally imposed, rule is itself unlawful. This is true. See *Aldworth Co., Inc.*, 338 NLRB 137, 147 fn. 48 (2002). However, as discussed above, the rule pursuant to which the Respondent is alleged to have issued the suspensions was not shown to have been unlawfully imposed. Moreover, the General Counsel did not introduce evidence that other employees who refused to follow similar orders were treated better, or otherwise show that union activity, rather than insubordination, was the reason for the suspensions.

For the reasons discussed above, I conclude that the allegation that the Respondent violated Section 8(a)(3) and (1) by suspending Andres Agosto, Ramon Alicea, Policarpio Gonzalez, Ernesto Martinez, Mariano Pagan, and Nelson Sandoval should be dismissed.

Statements by Gonzalez to Betancourt and Maldonado

The General Counsel alleges that the statements Gonzalez made to Betancourt and Maldonado on January 8 or 9 tended to restrain, coerce, and interfere with employees in the exercise of their rights under Section 7 of the Act. As discussed above, during the first days of the strike, Gonzalez called Betancourt and Maldonado to his office and stated that he would take adverse actions against the strikers unless they abandoned the strike. He also referred to the strikers using disparaging names and stated that he would never reach an agreement with the Union president. Had these statements been made to the striking employees of the company, I would have little difficulty finding that the General Counsel established a violation of Section 8(a)(1). See, e.g., *Bestway Trucking, Inc.*, 310 NLRB 651, 671 (1993) (threats of job loss unlawful), enfd. 22 F.3d 177 (7th Cir. 1994); *Baddour, Inc.*, 303 NLRB 275 (1991) (threats that strikers would lose their jobs unlawful). For the reasons discussed below, however, I conclude that both Betancourt and Maldonado were independent contractors, not employees. Moreover, neither Betancourt nor Maldonado was shown to have served as a conduit for conveying the threatening and disparaging comments made by Gonzalez to individuals who were employees. Therefore, I conclude that the General Counsel has failed to establish that the statements violate Section 8(a)(1).

the employer's explicit instruction that he or she acknowledge receipt of a specific document.

The Board determines whether an individual is an employee or an independent contractor by applying the common law agency test and considering all aspects of the individual's relationship to the employing entity. *Roadway Package System,* 326 NLRB 842, 849–850 (1998). Among the many factors that the Board has considered in making this determination in the cases of truckdrivers/owners are whether the individuals: perform functions that are an essential part of the company's normal operations; receive training from the company; do business in the company's name with assistance and guidance from it; are prevented from engaging in outside business; provide services under the company's substantial control; have substantial proprietary interests beyond their investment in their trucks; lack significant entrepreneurial opportunity for gain or loss; leave their vehicles overnight with the company; are subject to discipline by the company, Id. at 851–852; have control and responsibility for their own employees; select and acquire their vehicles; are responsible for the financing, inspection, or maintenance of the vehicles without involvement by the company; are guaranteed minimum compensation by the company; are required by the company to provide delivery services each scheduled workday, *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891–892 (1998); make their own arrangements for the parking and storage of the trucks when not in use; are free to decide whether to make their trucks available to the company on a particular day, *Portage Transfer Co.,* 204 NLRB 787, 787–789 (1973); receive direction from the company regarding the route to be used to a delivery point; are issued identification cards by the company; *National Freight, Inc.*, 146 NLRB 144, 146 (1964); operate trucks bearing the company's name; control the means by which he or she achieves the company's ends; *Deaton Truck Lines, Inc.*, 143 NLRB 1372, 1376–1378 (1963), affd. 337 F.2d 697 (5th Cir. 1964), cert. denied 381 U.S. 903 (1965); and have social security or other taxes withheld from their paychecks by the company; *Bowman Transportation, Inc.*, 142 NLRB 1093, 1096 (1963).

The record evidence, when considered through the prism of these factors, overwhelmingly leads to the conclusion that Betancourt and Maldonado performed their work for the Respondent as independent contractors, not employees. Betancourt and Maldonado operated their own businesses–purchasing and maintaining their trucks, and obtaining their trucking permits, all without involvement from the Respondent. They had entrepreneurial opportunities that are beyond those typically available to "employees." For example, Maldonado increased his revenue from the Respondent by purchasing a total of four trucks, and hiring three employees of his own to operate them. Betancourt and Maldonado were free to use their trucks to transport materials for other companies if they wished. They also bore certain risks of an entrepreneurial nature. For example, Betancourt and Maldonado purchased fuel for their trucks and the profits from their businesses could fluctuate based on the price of fuel. The Respondent generally paid them based on the weight of each load that they hauled, not based on an hourly rate or a salary, and did not provide fringe benefits, or deduct social security or income taxes from their paychecks.

Betancourt and Maldonado did not generally hold themselves out to the public at large as being associated with the

Respondent. The Respondent did not provide Betancourt or Maldonado with company uniforms, and the Respondent's name and logo did not appear on their trucks. The Respondent did not issue company identification cards to either Betancourt or Maldonado, although such cards were issued to all production employees. Betancourt, a witness for the General Counsel, explicitly testified that he was an independent contractor, and neither Betancourt nor Maldonado stated that they considered themselves employees.

The view that Betancourt and Maldonado are not employees is also supported by the fact that the delivery work they perform is not the essence, or an integral part, of the Respondent's business. Although like many companies, the Respondent arranges for the delivery of its products to customers, its primary business is manufacture, processing, and sale, not delivery. There is no allegation or evidence that the Respondent provides delivery services to other companies, or transports anything other than its own materials and products. Moreover, the Respondent exercises minimal control over the manner in which Betancourt and Maldonado carry out their work. The drivers are not required to appear every day for work, or to continue picking up and delivering loads throughout the day, and they select their own routes to destinations. Betancourt and Maldonado make their own arrangements for parking the trucks when they are not in use. In order to transport the Respondent's materials and products, Betancourt and Maldonado are required to make certain modifications to their trucks and to refrain from carrying materials that could contaminate what they are hauling for the Respondent. However, these limitations are imposed by the Environmental Quality Board, not the Respondent, and therefore, under Board precedent, are not indicative of control by the Respondent. See *Don Bass Trucking*, 275 NLRB 1172, 1174 (1985) (requiring compliance with Government-imposed regulations does not constitute company control because such regulations constitute supervision by the State, not the employer).

The General Counsel contends that Betancourt and Maldonado should be considered employees because they "work for the Respondent under vastly similar conditions as the truck drivers in the case of *Roadway Package Systems, Inc.*," General Counsel's Brief (I) at 10—a case in which the Board found Roadway's drivers to be employees. The General Counsel's characterization of the facts in *Roadway* as "vastly similar" to those at issue here is hard to understand. In truth, the circumstances relating to drivers in the instant case are *dissimilar* to those in *Roadway Package* in virtually all the respects that the Board found most telling there. The first sentence in the "analysis of factors" section of *Roadway Package* notes that the drivers "perform functions that are an essential part of one company's normal operations," and "constitute an integral part of the company's business." That was the case for the truck drivers in *Roadway Package* because the company's business was small package delivery. Obviously the work of truckdrivers who make deliveries is the essence of the business of a delivery company. However, the Respondent in this case is not a delivery company, but rather one whose essential business is the manufacture, processing, and importation of grain products. The next fact relied on by the Board in *Roadway Package* was that the company provided training to the drivers. This, too, is unlike the situation here; neither Betancourt nor Maldonado received training from the Respondent.

In *Roadway Package*, the Board noted that "the driver's connection to and integration in Roadway's operations is highly visible and well publicized." The Board based this conclusion on the facts that the company required drivers to wear a uniform approved by the company, drive identical vehicles that were designed and built according to the company's specifications, and display the company's logo and distinctive styling on their vehicles. Could the facts involved in the instant case be any more different? The Respondent here does not provide any type of uniforms or identification to Betancourt and Maldonado and their trucks do not carry the Respondent's logo, much less its distinctive styling. The Respondent has no part in the design of the trucks and does not require that a specific model be used.

The differences between the relevant facts in *Roadway Package* and the instant case do not end there. The employer in *Roadway Package* provided off-hours parking for the trucks, offered maintenance assistance, and left little room for drivers to influence their income level through their own efforts or ingenuity. As discussed above, the Respondent in the instant case did not provide off-hours parking, did not assist drivers with truck maintenance, and did allow the workers significant opportunity to increase their income level, as Maldonado did by obtaining multiple trucks and hiring other drivers to work for him. The Board noted in *Roadway* that the company had created significant barriers to the drivers performing outside work. By contrast, in the instant case there is no evidence that the Respondent created such barriers.

The cases of Betancourt and Maldonado are much more similar to the one in *Dial-A-Mattress*, where the Board found that the owner-operators involved were *not* employees, but rather independent contractors. As in the instant case, the owner-operators in *Dial-A-Mattress*, had the opportunity to make entrepreneurial profit, arranged their own training, hired their own employees, operated as independent businesses, and received no assistance from the company in the selection, acquisition, or maintenance of their vehicles.

For the reasons discussed above, I conclude that Betancourt and Maldonado were independent contractors rather than employees within the meaning of Section 2(3) of the Act.

In its initial brief, the General Counsel contends that Betancourt and Maldonado communicated Gonzalez'threatening and disparaging comments to the striking employees. The statements to nonemployees Betancourt and Maldonado arguably could be a violation if Gonzalez was using those individuals as a means of communicating his threatening and disparaging statements to persons who were employees. The Board has found a violation where an employer makes threats to a nonemployee with the intent of using that individual as a conduit to communicate the threat to an employee who is a spouse of the nonemployee. See, e.g., *Medin Realty Corp.*, 307 NLRB 497 (1992). In the instant case, however, I conclude that the record fails to show that Betancourt and Maldonado were used as conduits. There was no evidence that Gonzalez encouraged either truckdriver to communicate the threatening and disparaging comments to employees. Unlike in the case of threats made to

an employee's spouse, Betancourt's and Maldonado's interests cannot be presumed to be so closely bound up with those of the employees that the truckdrivers would reasonably be expected to react to Gonzalez' statements by attempting to influence those employees. Moreover, Betancourt and Maldonado were not shown to have communicated the threats to employees. It is true that Gonzalez encouraged Betancourt and Maldonado to talk to J. Figueroa, and that Betancourt, at least, did so. However, J. Figueroa was himself a nonemployee union organizer and statements threatening employees communicated to such an individual are not generally viewed as coercive in violation of the Act. *Basin Frozen Foods,* 307 NLRB 1406, 1412 fn. 28 (1992) (dictum); see also *Meat Cleaver*, 200 NLRB 960 fn. 2 (1972) (Board declines to adopt administrative law judge's finding that remarks made to nonemployees violated Sec. 8(a)(1) when made outside the presence of employees), enfd. mem. sub nom. *NLRB v. Asher*, 492 F.2d 1189 (9th Cir. 1974).[37]

I conclude that the allegation that Respondent violated Section 8(a)(1) of the Act by the statements Gonzalez made to Betancourt and Maldonado on about January 8 or 9, 2002, should be dismissed.

Garcia's Vacation Benefit

Complaint II alleges that in January 2002 the Respondent violated Section 8(a)(3) and (1) of the Act by withholding Domingo Garcia's vacation benefits. Garcia submitted a request for vacation leave shortly before the start of the strike, but the vacation dates he requested fell during the strike. Juarbe admitted that the reason Garcia's leave request was not processed when it arrived in the human resources department was that the strike had already commenced at that time. Tr. (II) 217. Juarbe testified that the human resources department approves leave requests if it is determined that the individual has accrued the amount of leave necessary to meet the request. Tr. (II) 294–295.

The General Counsel and the Respondent agree that the General Counsel has the prima facie burden of showing (1) that the vacation benefit had accrued, and (2) that the benefit was withheld on the apparent basis of the strike. General Counsel's Brief (I) at 12, Respondent's Brief (I) at 42; see also *Noel Corp.*, 315 NLRB 905, 911 (1994), enfd. in part 82 F.3d 1113 (D.C. Cir. 1996). If the General Counsel makes that showing, then the burden shifts to the Respondent to prove that it had a legitimate and substantial business justification for withholding the benefit." Id. In this case, the General Counsel failed to establish the first element of the prima facie case. Neither Garcia, nor Juarbe, nor any other witness testified that Garcia had accrued the vacation leave he was seeking. The record also lacks documentary evidence on the subject. The collective bargaining agreement provides that employees accrue leave if they work 100 hours in "each month," but the record does not show how many hours Garcia worked in any of the months leading up to his leave request. Nor does it show how much leave Garcia had already used. Indeed, in its brief on this subject, the General Counsel merely assumes that the Garcia had accrued the leave, and provides no argument or discussion regarding what it recognizes to be the first element of its prima facie.

Since the General Counsel has failed to establish the first element of the prima facie case, I conclude that the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by denying vacation leave to Garcia should be dismissed.

Although the General Counsel has failed to show that the Respondent unlawfully denied vacation leave to Garcia, I find that the evidence does establish that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to *consider* Garcia for such leave because of the strike. As discussed above, Juarbe admitted that the reason Garcia's leave request was not processed was that the strike had started by the time the request was received. There was no evidence showing that Juarbe believed Garcia lacked the necessary accrued vacation, and, indeed, Juarbe's testimony was that that his department stopped processing the request because the strike had begun, without ever determining whether Garcia was entitled to the vacation leave. The Board has recognized that denying an individual *consideration* can violate Section 8(a)(3) and (1) if that denial is motivated by the individual's union or protected concerted activity. For example, the fact that an employer discriminatorily denied an individual consideration for hiring or promotion has been found to be a violation of Section 8(a)(3) and (1), even if it is not shown that there was an actual position to which the individual could have been hired or promoted. See, e.g., *Wayne Erecting, Inc.*, 333 NLRB 1212 (2001) (discriminatory refusal-to-consider for hire); *Lancaster Fairfield Community Hospital*, 311 NLRB 401 (1993) (discriminatory refusal-to-consider for promotion). The same principal warrants finding a violation when an employer discriminatorily denies an employee consideration for vacation pay or another benefit, even if it is not shown that the benefit would have been awarded to the employee absent the discrimination. Under a modified version of the framework developed in the hiring and promotion context, a prima facie case of failure-to-consider a request for an existing job benefit is established where the evidence shows that (1) the employer excluded the employee from the consideration process for the existing job benefit, and (2) antiunion animus contributed to the decision not to consider the employee for the job benefit. See, e.g., *Wayne Erecting*, supra. If the General Counsel makes this initial showing, then the burden shifts to the employer to show that it would not have considered the individual even in the absence of his union activity or affiliation. Id.

In the instant case, both elements of a prima facie case are established by Juarbe's testimonial admission that Garcia's request for leave was not processed because the strike had commenced. The Respondent does not offer any basis for believing that it would have refused to consider Garcia's request if not for the strike. Indeed, it is not plausible that such a basis exists given Juarbe's admission and Garcia's testimony that his leave requests had always been honored in the past if, as here, he first obtained the approval of Curet.

[37] Of course, threats made to a nonemployee union agent may be a violation if the threats are *against* the union agent and seek to coerce him or her in the exercise of Sec.7 rights. See, e.g., *Bristol Farms*, 311 NLRB 437 (1993) (employer violated Sec. 8(a)(1) by threatening to arrest nonemployee union agents engaged in lawful handbilling).

I recognize that while the complaint contains an allegation that the Respondent discriminatorily denied Garcia vacation leave, it does not allege that the Respondent had discriminatorily denied him *consideration* for vacation leave. However, the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This is particularly true when the conduct is established by the testimonial admissions of the Respondent's own witness. *Letter Carriers Local 3825 (Postal Service)*, 333 NLRB 343 fn. 3 (2001); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); *Meisner Electric*, 316 NLRB 597 (1995), affd. mem. 83 F.3d 436 (11th Cir. 1996). As long as the unpled violations have been fully litigated due-process concerns are satisfied. *Seton Co.*, 332 NLRB 979, 981 fn. 9 (2000). I conclude that it is appropriate to find that the Respondent violated Section 8(a)(3) and (1) when it decided not to process his leave request because the strike had commenced. The testimonial admission of Juarbe, the Respondent's own human resources director, established this conduct. There is no dispute that Juarbe was, at all material times, a supervisor and agent of the Respondent. The other evidence of record, in particular the testimony of Garcia, Rossner, and Agosto, indicated that leave was routinely granted if Curet approved it. The violation based on the Respondent's discriminatory refusal to consider Garcia's leave request of January 2002 is closely connected to the allegation in complaint II that the Respondent discriminatory refused to grant that leave request. I conclude that this matter has been fully litigated.

I find that the Respondent violated Section 8(a)(3) and (1) by discriminatorily refusing to consider Garcia's January 2002 request for leave because the strike had commenced.

Medical Plan Payments for Rossner and Ortiz

Complaint II alleges that, when the Respondent discontinued making payments to the medical plans of Rossner and Ortiz, it violated Section 8(a)(3) and (1) of the Act because it was motivated by the employees' protected activity, including the strike. As set forth above, the General Counsel has the initial burden of showing that the medical plan benefit had accrued, and that the benefit was withheld on the apparent basis of the strike. *Noel Corp.*, supra at 911. If the General Counsel makes that showing, then the burden shifts to Respondent to prove a legitimate and substantial business justification for withholding the benefit. Id.

On January 10, 2002, just 2 days after the start of the strike, the Respondent informed Rossner and Ortiz, employees of approximately 20 years and 11 years, respectively, that it would discontinue its contribution to their group medical plan coverage. The Respondent had been providing the benefit to them for some time prior to the start of the strike and was still providing it when the strike began. Under the Respondent's established practice, Rossner and Ortiz, as employees on medical leave, were entitled to continue receiving the medical plan benefit for 24 months—a period that had not expired for either of them. The fact that the bargaining unit went on strike did not affect Rossner's or Ortiz' entitlement to receive the medical plan benefit while on medical leave. The Board has stated that "an employer may not presume that employees unable to work on and after the commencement of a strike are affirmatively supporting the strike and can therefore have benefits terminated as if they were strikers." *Gulf Oil Co.*, 290 NLRB 1158, 1160 (1988); *Conoco, Inc.*, 265 NLRB 819, 821 (1982), enfd. 740 F.2d 811 (10th Cir. 1984). This is true even if an injured employee attends the picket line during the strike. *Freeman Decorating Co.*, 336 NLRB 1, 8 (2001), enf. denied 334 F.3d 27 (D.C. Cir. 2003); *National Football League Management,* 309 NLRB 78, 86, 109 (1992). Based on this evidence, I conclude that both Rossner and Ortiz had accrued the medical plan benefit.

I also find that evidence establishes that the Respondent ceased contributing to Rossner's and Ortiz' medical plan on the apparent basis of the strike. Timing is an important factor in assessing discriminatory motivation. See, e.g., *Detroit Paneling Systems,* 330 NLRB 1170 (2000); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994). The timing in this case is enough to show an apparent link. On January 10, just 2 days after the strike commenced, the Respondent informed the two disabled employees that it would cease its contribution to their medical plan. The Respondent did not introduce any evidence to suggest that it was planning to discontinue, or had even contemplated discontinuing, this benefit before the start of the strike. Indeed, the Respondent appears to concede that its decision to discontinue the benefit was linked to the strike. Respondent's Brief (I) at 45. The link between the strike and the discontinuation of the benefit is also supported by the statements Gonzalez made just a day or two earlier indicating that he intended to make the strike as financially painful as possible for employees. The General Counsel has met its initial burden, and therefore the burden shifts to the Respondent to prove a legitimate and substantial business justification for cessation of the medical plan benefit.

The Respondent suggests that it was justified in discontinuing its contributions to the medical plan for Rossner and Ortiz because the employees were insured under a group medical plan obtained by the Union and "a reasonable inference can be drawn . . . that the Company had no knowledge as to the terms and conditions of the insurance coverage and/or if the insurance Company would allow individual coverage of particular employees." Respondent's Brief (I) at 46. This unsupported speculation by Respondent's counsel about the fate of the group medical plan and the availability of individual coverage falls far short of meeting the Respondent's burden of proving a legitimate and substantial business justification. Not one of the Respondent's officials testified that he or she had doubts about the availability of the medical plan during the strike, or claimed that such doubts in any way contributed to the Respondent's decision to discontinue the medical plan payments for Rossner and Ortiz. Even if the Respondent harbored such doubts, that would be insufficient to show the necessary business justification, unless the Respondent had a legitimate and substantial basis for those doubts. None of the Respondent's officials testified that the insurance company, the Union, or any other source, informed the Respondent that the group health plan was being discontinued or that the Company's individual contribu-

tions for Rossner and Ortiz would no longer be accepted or could not be applied to preserve coverage. Nor did any official of the Company testify that, before discontinuing the payments, the Respondent made an effort to find out whether the group medical plan had been canceled, or whether Rossner and Ortiz could continue to be covered. To put it bluntly, the business justification suggested in the Respondent's brief is completely without factual basis and gives every indication of being purely an invention of counsel. The Respondent has not met its burden of showing a legitimate and substantial business justification for its action.

I conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by discontinuing its payments to the medical plans for Rossner and Ortiz because employees engaged in a strike.[38]

Employees Laid Off and Permanently Replaced

Complaint II alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating the employment of 15 unit employees on February 27, 2002, and 26 unit employees on April 16, 2002, because of the employees' union and protected concerted activities, including engaging in the strike that began on January 8, 2002.

Under the Board's decision in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the General Counsel meets its initial burden of showing that a layoff was unlawfully motivated by establishing that the employees engaged in protected activity, that the employer knew of the activity, and that the employer demonstrated antiunion animus. *Vico Products Co.*, 336 NLRB 583, 587–588 (2001), enfd. 333 F.3d 198 (D.C. Cir. 2003). Unlawful motivation can also be inferred from circumstantial evidence, such as the timing of the layoff. Id. Once the General Counsel meets its initial burden, the burden shifts to the Respondent to show that it would have laid off the employees even in the absence of the protected activity. Id. at 587 fn. 15. With respect to the 15 employees alleged to have been unlawfully terminated on February 27, the General Counsel easily clears the three hurdles to meeting its initial burden. The employees were engaged in protected activity—a strike—at the time of the layoff, and the Respondent was aware of this activity. The General Counsel has also shown antiunion animus. As discussed above, Gonzalez, the Respondent's owner and president, called the striking employees "jerks" and "sons of bitches," and said that they would find themselves "out of the company, they wouldn't return" unless they abandoned their strike that day. He said that he would refuse to reach agreement with Union, would laugh at the plight of the strikers when their money ran out, and was willing to spend $2 million to rid the company of the strikers. Moreover, the layoff was the sort of action that Gonzalez indicated he would take to punish the strikers. Although Gonzalez' statements were made to nonemployees and therefore did not amount to a violation of Section 8(a)(1), that does not diminish the antiunion animus implicit in the statements. See *Basin Frozen Foods*, supra at 1412 fn. 28. I conclude that the General Counsel has met its burden of showing that unlawful motivation played a part in the Respondent's decision to lay off 15 unit employees on February 27, and the burden therefore shifts to the Respondent to show that it would have laid off the employees even absent their protected activity.

The Respondent states that its decision to lay off the 15 striking employees was the result of an ongoing project to reduce staffing needs by modernizing and automatizing its facilities. Gonzalez testified in some detail about this project, which began in 1996 and was continuing at the time of the strike and layoff. He described new equipment that was purchased and installed at the Respondent's facilities and which reduced the Respondent's need for unit employees. He discussed photographs of some of the new equipment and explained the function of the equipment in the Respondent's operation. He also testified that recent changes made the Respondent's operation so much more efficient that the company had been able to shut down one of its older assembly lines at one facility, significantly decreasing staffing needs. The modernization and automation project had resulted in one or two layoffs per year. In addition, Gonzalez stated that the Respondent's sales declined below expectations in early 2002, further reducing staffing requirements. The Respondent selected the particular employees who were laid off for the February 2002 layoff by following the procedures in the CBA.

The General Counsel did not introduce evidence that rebutted Gonzalez' facially plausible, and quite detailed, testimony that a significant decrease in staffing needs had resulted from the modernization and automation project and from a dip in sales. No testimony or other evidence was produced indicating that the changes in equipment described by Gonzalez had not occurred or that those changes had not, as he claimed, reduced the Respondent's need for unit employees as of early 2002. Similarly, there was no testimony or other evidence disputing Gonzalez'statement that the February 2002 layoff was one of many work force reductions that had been implemented since the Respondent began the modernization and automation project in 1996. Nor was there any probative evidence contradicting Gonzalez' statement that, during contract negotiations in 2001, he informed the Union's bargaining team that further staff reductions were anticipated. There was also no testimony or other evidence to rebut Gonzalez' testimony that the Respondent's sales dipped below expectations in the early months of 2002, after the strike commenced. Moreover, the General Counsel failed to show that the 15-employee staff reduction

[38] Complaint II also alleges that by discontinuing its medical plan payments for Rossner and Ortiz the Respondent has been failing and refusing to bargain collectively and in good faith with the Union in violation of Sec. 8(a)(5) and (1). Neither the General Counsel nor the Respondent discusses this refusal to bargain allegation in their briefs. Indeed, the statements of issues in the General Counsel's briefs do not include an 8(a)(5) and (1) allegation based on the medical plan payments for Rossner and Ortiz among the issues listed. In its briefs, the General Counsel seeks no relief related to this allegation and does not discuss whether evidence shows that the Respondent offered the Union an opportunity to bargain on the subject. I conclude that the General Counsel has abandoned the claim that the Respondent violated Sec. 8(a)(5) and (1) of the Act when it discontinued the medical plan payments for Rossner and Ortiz, and that the issue was not fully litigated. I reach no determination regarding the issue.

from 41 to 26 bargaining unit employees was not real. Indeed, the evidence indicates that once all 41 bargaining unit employees had been eliminated from the work force, the Respondent hired only 25 replacement workers. The record does not show that the Respondent returned to the 41-employee, pre-layoff, staffing level for the type of work done by bargaining unit employees, or even that the Respondent exceeded the 26-employee level that resulted from the February layoff.[39] This tends to support to conclusion that the Respondent had experienced a real decrease in its need for production employees.

The timing of the layoff—less than 2 months after the commencement of the strike—is somewhat suspicious. This timing is especially curious given that the 15 laid-off employees were already on strike and, therefore, were not providing services to the Respondent at the time they were laid off. However, the Respondent discussed the need for staff reductions during contract negotiations with the Union in 2001. This establishes that a layoff was being considered before the strike, and undercuts the suggestion that the timing of the layoff was dictated by the strike. Regarding the decision to lay off employees who were already withholding services, Gonzalez explained that once he concluded that the 15 striking employees would not be needed when the strike ended, he wanted to notify the employees immediately so that they could obtain government benefits, such as unemployment compensation and food stamps. He stated that he thought it would be "immoral" to delay notifying the employees of the layoff until the strike ended because that would mean the affected employees would have to go months without receiving government benefits to which they were entitled. The General Counsel has not disputed Gonzalez' assertion that by notifying the Union of the layoff the Respondent enabled the laid-off individuals to obtain government benefits that would otherwise have been unavailable to them. Although Gonzalez' professed concern for the well-being of the strikers is suspect given his other behavior, in particular his statements to Betancourt and Maldonado, I believe that his explanation is sufficiently plausible, in light of the record as a whole, to negate any inference that might otherwise be raised by the timing of the layoff.

The General Counsel notes that Juarbe's February 27 letter informing the Union of the layoff does not mention the modernization and automation project, but rather states that the reductions were the result of "economic reasons and . . . a substantial decrease in production and sales." Although both Gonzalez' and Juarbe's explanations for the layoff boil down to a claim that the services of the laid off workers were no longer necessary to meet the company's production needs, I do see their explanations as inconsistent inasmuch as Gonzalez attributes that lack of need primarily to increased efficiency and Juarbe attributes it to decreased demand. The fact that an employer offers shifting explanations for terminating employees is evidence of pretext. *Douglas Foods Corp.*, 330 NLRB 821 (2000), review granted in part 251 F.3d 1056 (D.C. Cir. 2001). I have considered this evidence, but conclude that the inconsistency in this case is of little probative value. First, while Gonzalez testified that the modernization and automation project was the main reason for the layoff, he also testified, consistent with Juarbe's letter, that a dip in sales also decreased staffing needs. In addition, Juarbe, who prepared the letter, was not one of the participants in the meeting at which the decision to lay off employees was made. In fact, Juarbe was not informed about the layoff decision until February 27, when Gonzalez directed him to prepare the letter informing the Union about the layoff. Juarbe finalized the letter the same day. As the Respondent's director of human resources, Juarbe's duties involved recruiting and selecting employees, administering the CBA, establishing rules and procedures, and disciplining employees, but not such things as monitoring production and sales. Under these circumstances, I consider it not unlikely that the discrepancy between Gonzalez' explanation and the one given in Juarbe's letter resulted from the fact that the letter was prepared on short notice by someone who was not involved in either the decision to implement a layoff or in managing the Respondent's production and sales. The evidence substantiating the Respondent's position that an ongoing modernization and automation project had reduced staffing needs was detailed, plausible, and uncontroverted; it outweighs the evidence casting doubt on the veracity of the Respondent's explanation. The Respondent has shown that it more likely than not would have decided to implement its February 2002 layoff because its staffing needs had decreased, even absent the employees' protected activities.

For the reasons discussed above I conclude that the allegation that the Respondent violated Section 8(a)(3) and (1) by terminating 15 employees in February 2002 should be dismissed.

The General Counsel argues that the April 16 termination of 26 bargaining unit employees was unlawful because "when an employer falsely informs striking employees that they have been permanently replaced, the employer unlawfully discharges the strikers in violation of Section 8(a)(1) and (3)." General Counsel's Brief (I) at 26; see also *Consolidated Delivery & Logistics*, 337 NLRB 524, 525 (2002), enfd. 63 Fed. Appx. 520 (D.C. Cir. 2003); *Noel Corp.*, 315 NLRB at 907; *Mars Sales & Equipment Co.*, 242 NLRB 1097, 1101 (1979), enf. granted in relevant part 626 F.2d 567 (7th Cir. 1980).[40] According to the

[39] There was evidence that, at the time of the layoff, the Respondent was in the process of an expansion that was expected to create new jobs. However, the record does not show that these new jobs involved work comparable to that performed by bargaining unit employees.

[40] The General Counsel has not pled, or argued, that the replaced employees were unfair labor practice strikers or that the Respondent was prohibited from permanently replacing them. Nor does the General Counsel contend that the strikers had made an unconditional offer to return to work at the time they were permanently replaced in April 2002. The Union did not present an independent case at trial, or a brief after trial, or otherwise contend in this proceeding that the employees should be found to have been unfair labor practices strikers or that they made an unconditional offer to return prior to April 17. Since it is not alleged either that the employees were engaged in an unfair labor practices strike, or that the strikers had made an unconditional offer to return to work prior to their permanent replacement the Respondent's right, under *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938), to hire permanent replacements in April 2002 is not an issue here.

General Counsel, the Respondent's statement that the 26 employees had been permanently replaced on April 16 was false because the replacement workers hired at that time were all subject to probationary periods.

The Respondent bears the burden of proving the permanent status of strike replacements. *Consolidated Delivery & Logistics*, supra at 526. In this case Juarbe testified, without contradiction, that the replacements had previously worked for the Respondent through a temporary agency, but on April 16 were hired as permanent employees of the Respondent, subject only to the completion of their probationary periods. Juarbe's testimony on this point is consistent with the documentary evidence showing that the employees entered into employment contracts directly with the Respondent on April 17. Juarbe testified that the understanding with the replacements at that time was that they would work for the Respondent indefinitely. This, too, is corroborated by the employment contracts, which do not state that the employment will end on particular day, or limit the duration of the employment to a certain number of days. There was no significant evidence to contradict Juarbe's claim that, on April 17, the replacements were hired with the understanding that they would work indefinitely.

The General Counsel's argument that the striker replacements were not permanent because they were hired subject to a probationary period fails under Board precedent. The Board has held that replacements hired to work indefinitely subject to a probationary period are considered permanent replacements during the probationary period. Id. at 626 fn. 5; *Solar Turbines Incorporated*, 302 NLRB 14, 15 (1991), affd. sub nom. mem. *Machinists v. NLRB*, 8 F.3d 27 (9th Cir. 1993); *Anderson, Clayton & Co.*, 120 NLRB 1208, 1214 (1958); and *Kansas Milling Co.*, 97 NLRB 219, 225–226 (1951). The 25 replacement employees began on April 17 with the understanding that they would work indefinitely, and thus they were permanent replacements as of that day, despite the fact that they were subject to probationary periods. The Respondent's statement that the strikers were being permanently replaced was not false. Therefore, the precedent relied on by the General Counsel is inapplicable, and the statement does not give rise to a violation of Section 8(a)(3) and (1).[41] The Union did not make an unconditional offer to return to work until July 10—well after the replacements were hired as permanent employees.

I conclude that the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act on April 16, 2002, by telling 26 unit employees that they had been permanently replaced should be dismissed.

The complaint, as amended (see GC Exhs. 1(ll) and (hh)), also alleges that the terminations in February and April were mandatory subjects of bargaining and that the Respondent failed to bargain over them in violation of Section 8(a)(5) and (1). It is well established that layoff decisions are a mandatory subject of bargaining and that an employer who conducts a layoff without giving the union notice and an opportunity to bargain violates the Act. *SPX Corp*., 333 NLRB 875 fn. 1 (2001); *Kajima Engineering*, 331 NLRB 1604, 1619–1620 (2000); and *Holmes & Narver*, 309 NLRB 146, 146–147 (1992); see also *NLRB v. Katz*, supra. The record and applicable law lead me to conclude that the Respondent unlawfully failed to bargain over the February 27 layoff in violation of Section 8(a)(5) and (1) of the Act. J. Figueroa testified that the Respondent did not give the Union prior notice or an opportunity to bargain over the changes. The only contrary evidence is Gonzalez' testimony that during negotiations for a new contract prior to the layoff, he informed the union committee that the Respondent intended to continue with staff reductions in the future. Gonzalez' general statements that the Respondent anticipated layoffs in the future do not constitute adequate notice about the specific layoff that was carried out by the Respondent on February 27, and do not give rise to a colorable argument that the Union waived bargaining. See *Gannett Co.,* 333 NLRB 355, 357–358 (2001) ("notice must afford the union a reasonable opportunity to evaluate the proposals and present counterproposals before implementing [the] change"); *Sierra International Trucks, Inc.*, 319 NLRB 948, 950 (1995) (employer's "inchoate and imprecise" statement regarding "future plans about which the timing and circumstances are unclear" is insufficient notice); *Oklahoma Fixture Co.*, 314 NLRB 958, 960–961 (1994), enf. denied 79 F.3d 1030 (10th Cir. 1996). According to Gonzalez, it was not until February 2002 that the Respondent's officials had the meeting at which a decision was made to lay off employees effective February 27. Neither Gonzalez, nor any other witness, testified that, once the Respondent decided to have the specific layoff, the Respondent ever gave the Union notice or an opportunity to bargain.

I find that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing the February 27 layoff without giving the Union adequate notice and reasonable opportunity to bargain.

The General Counsel does not make any argument to support the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with notice and an opportunity to bargain regarding the April 16 action affecting 26 unit employees. As discussed above, I have concluded that those 26 bargaining unit employees were permanently replaced. A Respondent's right to continue its business by hiring permanent replacements during an economic strike is not limited by an obligation to provide the Union with notice and an opportunity to bargain regarding that decision. *Times Publishing Co.*, 72 NLRB 676, 684 (1947). Since the Respondent did not have a duty to bargain over the permanent replacement of the 26 employees, it did not violate the Act by failing to do so.

I conclude that the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to give the Union notice and an opportunity to bargain regarding the termination of 26 bargaining unit employees on April 16 should be dismissed.

[41] I do not consider it significant that the Respondent's April 16 letter to the strikers stated that they would be permanently replaced as of 5 p.m. that day, but the Respondent did not actually hire the replacements as permanent employees until the start of business the next day. Absent evidence that the strikers were planning on making an unconditional offer to return on April 16 or 17, or other unusual circumstances not present here, any gap that arguably exists between the close of business on April 16 and the start of business on April 17 is of no consequence.

Alleged Direct Dealing

The complaint alleges that the Respondent dealt directly with unit employees in violation of Section 8(a)(5) and (1) in March and April 2002 by soliciting employees to accept the Respondent's proposal for a collective-bargaining agreement and by seeking a response from employees to the proposal. "In order to prove [unlawful direct dealing], it must be shown that Respondent is communicating with its represented employees and that the discussion is for the purpose of establishing or changing the wages, hours, and terms and conditions of employment . . . or undercutting the Union's offer to establish or change them, and finally, such communication must be to the exclusion of the Union." *Southern California Gas Co.*, 316 NLRB 979, 982 (1995); see also *Permanente Medical Group*, 332 NLRB 1143, 1145 (2000). "[A]n employer has a fundamental right . . . to communicate with its employees concerning its position in collective bargaining negotiations," *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985), but is obligated "to deal with the employees through the union, and not with the union through the employees." *General Electric Co.*, 150 NLRB 192, 195 (1964).

The record shows that the Respondent distributed a proposal for a new CBA to represented employees at the Arroz Rico facility within a day or two after providing that proposal to the Union. Thus the General Counsel has proven both that the Respondent "communicat[ed] with its represented employees" and did so regarding a matter relating to changes in wages and other terms and conditions of employment. The General Counsel's case stumbles over the requirement that the communication be made "to the exclusion of the Union." Although under the circumstances I question how meaningful an opportunity the Union had to communicate with unit members about the proposal before the Respondent delivered it to employees, the fact remains that the Respondent delivered the proposal to the Union first. The Respondent's actions bring it to the brink of dealing "with the union through the employees." However, I do not believe one can say under the circumstances present here that the Respondent crossed over into unlawful territory, and the General Counsel provides no authority or argument that indicates otherwise. See *Putnam Buick*, 280 NLRB 868 (1986) (Employer did not violate Sec. 8(a)(5) by calling its employees together and passing out copies of contract proposals that had been provided to the union earlier that day.), affd. 827 F.2d 557 (9th Cir. 1987).

The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) by seeking a response from employees to the CBA proposal. The General Counsel relies on *Hancock Fabrics*, 294 NLRB 189 (1989), enfd. mem. 902 F.2d 28 (4th Cir. 1990), for the proposition that an employer may not poll employees about their preferences with respect to changes to existing conditions of employment. In the instant case, however, the General Counsel has not shown that officials of the Respondent either asked any employees what their preferences were regarding the changes embodied in the Respondent's proposal, or otherwise sought a response from employees about the proposal. Indeed, Jacobs told employees that the proposal was being distributed so that employees would be able to discuss it with the union bargaining committee or in assembly, not so that they could discuss it with management officials. I believe the Respondent's action falls within the category of lawful communications "to employees concerning its position in collective bargaining negotiations." *United Technologies Corp.*, supra.

For the reasons discussed above I conclude that the allegations that the Respondent dealt directly with employees in violation of Section 8(a)(5) and (1) by distributing a proposed CBA to employees and seeking a response from employees regarding the proposal, should be dismissed.

Reduced Wages Paid to the Former Strikers

The General Counsel alleges that when the former strikers resumed working in October and November 2002, the Respondent paid them reduced wages because they had engaged in the strike. Prior to the strike these employees were earning between $6.15 and $9.31 per hour. When they returned after the strike, the Respondent paid each of them only $5.15 an hour, the lowest wage allowed under the collective-bargaining agreement, and one that was only permissible for "new" employees. This wage was well below the minimum the Respondent was allowed to pay nonprobationary employees in the both the skilled and the unskilled classifications. After the returning strikers completed their probationary periods, the Respondent did not give them the increases that were automatic under the CBA, but continued to pay them only $5.15 an hour. For the reasons discussed below, I find that the Respondent discriminatorily paid the returning strikers reduced wages because of their protected activity, and therefore violated Section 8(a)(3) and (1) of the Act.

The General Counsel easily meets its initial burden under *Wright Line*, supra, of showing that the Respondent's decision to reduce the wages of the returning strikers was motivated by antiunion animus. The alleged discriminatees had all engaged in a strike against the Respondent and the Respondent was aware of that activity. The statements that the Respondent's president, Gonzalez, made to Betancourt and Maldonado show antiunion animus and are strong evidence that Gonzalez planned to act on that animus by punishing the strikers financially if they participated in the work stoppage. Since the General Counsel has met its initial burden, the burden shifts to the Respondent to show that it would have reduced the wages of the laid-off employees even absent the protected activity.

The Respondent argues that it treated the returning strikers as new hires who would be paid only $5.15 an hour because those individuals resigned when they failed to appear on August 15 in response to an invitation from the Respondent, and when they failed to enter the Respondent's facility on August 22 in order to be reemployed. This contention is without merit. Even assuming that the returning strikers had resigned and could be treated as new employees that would not explain the Respondent's decision to pay them as little as it did. Since the strike began, the Respondent has hired a number of employees who were not strikers and the Respondent started them all at wages in excess of the $5.15 per hour that was paid to all the employees who had participated in the strike. This was true despite the fact that most of the former strikers were skilled and had many years of experience with the Respondent. The Respondent has not shown that it had a legitimate reason for paying the return-

ing strikers less than other, nonstrikers, hired since January 8, 2002. The record leads me to conclude that although the CBA allows a wage of $5.15 per hour for new hires, the Respondent reserved that low wage for those employees who had participated in the strike. Moreover, the Respondent's claim that it was simply following the CBA provisions regarding wages is belied by the fact that when the returning strikers completed their probationary periods, the Respondent denied them the wages increases of a $1 or more per hour each that were automatic under the CBA.[42] Thus, the Respondent has failed to show that it would have reduced the wages of the returning strikers to $5.15 per hour absent the protected activity.

Even if the record showed that the Respondent had consistently paid new employees $5.15 per hour, I would reject the Respondent's argument because the company was not entitled to treat the former strikers as new employees. In *Laidlaw Corp.*, 171 NLRB 1366, 1369–1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), and subsequent cases, the Board has made clear that "economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements remain employees" and cannot be treated as new hires or entry-level employees. See also *Detroit Newspapers*, 340 NLRB 1019 (2003); *Alaska Pulp Corp.*, 326 NLRB 522 (1998), enf. granted in part, denied in part on other grounds 231 F.3d 1156 (9th Cir. 2000); and *Transport Co. of Texas,* 177 NLRB 180, 185 (1969), enfd. 438 F.2d 258 (5th Cir. 1971).

In an effort to avoid the application of *Laidlaw*, the Respondent contends that it could treat the returning strikers as new employees because they had resigned their employment by failing to return to work on August 15 and 22 in response to offers of reinstatement. Regarding the August 15 date, the record shows that, while the Respondent invited former strikers to come to its facility, it did not make any of them an offer of reinstatement. The August 13 letter that the Respondent characterizes as an offer of reinstatement states that the former strikers "have been permanently replaced," but that "there have recently been some vacancies" and that all the "employees affected," should appear at the Respondent's facility on August 15 so that it could be determined which among them "are entitled" to fill the vacancies. This letter is notable for what it does not state. It does not state that the Respondent is offering *any* of the former strikers their former positions, or substantially similar ones. It does not state what type of work the former strikers are being invited to seek, the location where the work will be performed, the wages that will be paid, or any of the other conditions of employment. Moreover, although the Respondent invites the Union to appear on August 15 with "all affected employees," the letter does not state that it will re-employ all, most, or even a significant minority of the former strikers who respond. The letter does not name a single employee who the Respondent is offering to re-employ on August 15, but only states that it will determine who is "entitled" to the vacancies. The letter does not even state that the former strikers will have preference over other applicants. It is not clear it is anything more than an invitation for the former strikers to apply for an undisclosed number of unspecified vacancies. Certainly, it is not what the Respondent now suggests—i.e., an offer to reinstate all the replaced strikers to their former positions, or to substantially similar ones.

Even if the Respondent's August 13 letter offered specific employees reinstatement to their former, or substantially similar, positions, I would conclude that it was not a valid offer because it did not provide a reasonable amount of time for the former strikers to accept reinstatement and arrange to report. In *Toledo (5) Auto-Truck*, 300 NLRB 676 (1990), enfd. mem. 986 F.2d 1422 (6th Cir. 1993), the Board found that an employer violated Section 8(a)(3) and (1) by unlawfully terminating the recall rights of two former strikers who failed to appear in response to a recall notice stating that they had to report by a specific date or their recall rights would be terminated. The Board stated that an offer of reinstatement is invalid if the time period in which to report is "unreasonably short" and the offer "[m]akes it clear that reinstatement is conditioned on the employee's returning to work by the specified date." 300 NLRB at 676 fn. 2. One of the employees in *Toledo* received notification 3 days before the reporting deadline, and in the other instance the employee actually received the letter after the reporting deadline. The Board stated that such an offer is invalid "on its face," and that employees are not even required to respond. Id. In the instant case, the employees had not worked for the Respondent in over 7 months, and it had been more than 4 weeks since the Union made the unconditional offer to return to work, yet the Respondent's August 13 letter to the Union gave the employees only 48 hours to appear. Under the circumstances, it was unreasonable to expect the Union to be able to communicate with all the former strikers and for those former strikers to arrange to make themselves available within such a short period of time. The Respondent has not shown that there were any unusual circumstances that made the 48-hour deadline essential. Under *Toledo*, the Union was not even obligated to respond to the Respondent's invalid offer, but the Union did respond, and did so within a reasonable period of time, in its April 15 letter offering to meet with the Respondent.[43] Since

[42] The Respondent claims that it did not give wage increases to the returning strikers who completed their probationary periods because the Union never requested bargaining regarding the matter. However, the increases that the CBA provides for upon the completion of the probationary period are automatic, and do not require bargaining. Indeed, the Respondent's decision to deny those automatic raises, and thereby change the dynamic status quo under the CBA, was itself a change about which it was obligated to bargain. See *Ventura County Star-Free Press*, 279 NLRB 412, 419–420 (1986) (pay step increases granted to employees when they reach new experiences levels are part of a dynamic status quo and cannot be discontinued without bargaining).

[43] The Respondent relies on *Esterline Electronics Corp.*, 290 NLRB 834 (1988), to argue that it made a valid offer of reinstatement. That case provides that an unreasonably short response deadline does not, by itself, render an offer of reinstatement invalid unless the offer states or suggests that the offer will lapse if the employee does not make a decision on restatement by the deadline. Under *Esterline*, if the employer does not indicate that the offer will lapse after the expiration of the unreasonable deadline, the employees have an obligation to contact the employer to see if the deadline will be extended. In this case, I believe that the Union and employees would reasonably read Juarbe's August 13 letter as suggesting that those who wanted to return had to appear on

the Respondent's letter of August 13 letter was not a valid offer of reinstatement, the replaced strikers did not voluntarily resign by failing to appear on August 15.

I also conclude that the employees did not voluntarily resign on August 22 when they failed to enter the Respondent's facility. At that time, the Respondent had still not clarified how many vacancies there were, what types of vacancies the employees would be considered for, or what the terms and conditions of employment would be. The Respondent had not told the Union or the employees that it was offering any of them reinstatement to their former positions or to substantially equivalent positions, or even that any former striker would necessarily be reemployed if they appeared.[44] Thus, when the former strikers failed to enter, they were not rejecting an offer of reinstatement, resigning their employment, or forfeiting their rights under *Laidlaw.*[45]

For the reasons discussed above, I conclude that the Respondent has failed to meet its burden under *Wright Line* of showing that it would have reduced the wages of the former strikers even absent the protected activity. I find that the Respondent violated Section 8(a)(3) and (1) of the Act by reducing the wages of the former strikers employees.

Work Shifts

The complaint alleges that the Respondent unlawfully discriminated against the 41 strikers by assigning them to less desirable work shifts after the strike. At trial, however, the General Counsel failed to introduce evidence that the former strikers, with one exception, were even assigned to less desirable work shifts, much less that they were assigned to such shifts for discriminatory reasons. Indeed, 11 of the former strikers who the complaint alleges were assigned to "less desirable" work shifts have been returned to the same shift they worked prior to the strike. Another eight of the former strikers have worked at least part of the time on their prestrike shift. There was no testimony that those returning strikers who were not given their prestrike schedules were assigned to shifts that were generally regarded by employees or company officials as less desirable. Only one of the returning strikers, Carlos Fernandez Centeno, testified that he personally considered his post-strike schedule less desirable.[46] In Fernandez' case I conclude that the General Counsel failed to show that the Respondent made a decision to assign him to a less-desirable shift. The evidence did not show that when the Respondent chose Fernandez for the 2 to 10:30 p.m. schedule, Fernandez had stated a poststrike shift preference, or that the Respondent otherwise knew that Fernandez would consider that shift undesirable. Even if the Respondent had knowingly gone against Fernandez' shift preference, the record here would not establish that the decision was connected to the Respondent's antiunion animus. Fernandez participated in the strike, but it was not shown that he had engaged in any protected activities that distinguished him from the other strikers or provide a basis for believing that the Respondent would single him out for an undesirable shift assignment.

I find that the allegation that the Respondent discriminatorily assigned the former strikers to less desirable shift assignments in violation of Section 8(a)(3) and (1) has not been proven and should be dismissed.

Reinstatement to the Same, or Substantially Equivalent Positions

The complaint alleges that since October 29, 2002, the Respondent has discriminated against the former strikers by not offering them the positions previously occupied by them or substantially equivalent positions of employment. For the reasons discussed below I conclude that this allegation has merit.

In *Laidlaw Corp.,* the Board stated:

> [E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

Id. at 1369–1370; see also *Detroit Newspapers*, 340 NLRB 1019 (If the former positions do not exist, the former strikers are entitled to reinstatement in substantially equivalent positions.).

The record shows that the former strikers made an unconditional offer to return to work on July 10, 2002. (See GC Exh.

August 15 at 2 p.m. and that the invitation would expire after that time. At any rate, on August 15, the Union met any obligation it had under *Esterline* by responding to the company's invitation and proposing to meet on August 20.

[44] The letters inviting the former strikers to the Respondent's offices on August 22 date stated that "there are some vacant positions for which you can qualify," but those letters did not state how many positions there were or that the former strikers necessarily would qualify for them.

[45] Even if the Respondent had made a valid offer of reinstatement, I would find that the Respondent failed to show that the employees resigned on August 22 when they refused to enter the facility without J. Figueroa. More specifically, the Respondent did not establish that it was entitled to prohibit J. Figueroa—the union official chosen to speak for the unit—from accompanying the employees into the facility in order to discuss the details of their return to work. Indeed, in a separate case, currently pending before the Board, the administrative law judge found that the Respondent's refusal to permit J. Figueroa into its facility was itself an unfair labor practice. See supra at fn. 19. An offer to reinstate strikers becomes invalid if the Respondent conditions the offer on the strikers accepting an unfair labor practice. See *Royal Motor Sales*, 329 NLRB 760, 777 (1999) (lockout unlawful when it had the purpose of pressuring employees to accept unfair labor practice), enfd. Fed. Appx. 1 (D.C. Cir. 2001); *D.C. Liquor Wholesalers*, 292 NLRB 1234 fn. 3 (1989) (lockout is not in support of a "legitimate bargaining position," when it is being used to pressure employees to accept unlawfully implemented last offer), enfd. 924 F.2d 1078 (D.C. Cir. 1991).

[46] Another employee, Jose Rossner, testified that before the strike he had chosen to work a particular shift so that he could tend to his father who was experiencing medical problems. However, Rossner's father passed away prior to his reemployment, and Rossner did not testify that he still had a shift preference. At any rate, within 5 days of returning to work he was assigned to his prestrike shift.

60; see also GC Exhs. 63, 64.)[47] During the following September and October, the Respondent hired at least six new employees to perform bargaining unit work at the Amelia facility. Despite the former strikers' unconditional offer to return to work, and the requirements discussed in *Laidlaw*, the Respondent did not offer any of these positions to the former strikers who had performed bargaining unit work at the Amelia facility prior to the strike. The Respondent contends that, *Laidlaw* notwithstanding, it is not required to offer full reinstatement to the former strikers when appropriate openings occur because those individuals resigned their employee status on August 15 and 22 by refusing offers of reinstatement. In keeping with this contention, the Respondent has treated the returning strikers not as persons who "remained employees" under *Laidlaw*, but as new employees who were required to fill out applications, complete probationary periods, and work for a reduced, introductory, wage. For the reasons discussed above, I have rejected the Respondent's claims that it made valid offers of reinstatement and conclude that the former strikers did not refuse any such offers or resign their employment. Therefore, the Respondent violated the Act by denying the former strikers their rights under *Laidlaw*, both by failing to reinstate them when appropriate openings occurred, and by treating them as new hires rather than as persons who had "remained employees."[48]

I conclude that the Respondent has violated Section 8(a)(3) and (1) of the Act by treating the returning strikers as new hires, and denying them reinstatement to their previous positions or substantially equivalent positions when such positions became available after the employees made their unconditional offer to return to work.

More Onerous Working Conditions

The complaint alleges that the Respondent violated section 8(a)(3) and (1) of the Act in the following manner:

> Since on or about October 29, 2002, Respondent has discriminated against the [former strikers] regarding their terms and conditions of employment by imposing on them more onerous and rigorous working conditions such as lifting heavy feed bags.

I find this allegation facially ambiguous. The question I have is "more onerous" than *what*—the positions the former strikers occupied before the strike or other positions that have become available since they returned to work? The General Counsel appears to have understood this allegation as meaning the former, since it introduced extensive testimony comparing the work that the former strikers did before the strike with the work they did after the strike. That evidence did show that in many cases the returning strikers were assigned tasks that were more onerous, sometimes considerably more onerous, than those they performed before the strike. This comparison is beside the point, however, since the alleged discriminatees were economic strikers whom the Respondent lawfully replaced on a permanent basis before the strikers made an unconditional offer to return to work. Therefore, the Respondent was not required to reinstate the former strikers to their previous positions, or substantially equivalent positions, until such openings occurred, regardless of how onerous the former strikers found their current working conditions.

Perhaps the General Counsel could have made out a violation using evidence that the Respondent assigned the returning strikers to positions that were more onerous than other positions that have been available since the former strikers were reemployed. However, the record does not contain such evidence. The General Counsel did not show what other positions have opened or been filled since the former strikers returned to work and certainly has not shown how onerous or rigorous the duties and responsibilities of any such positions were. Given this defect in proof, it is possible that the assignments the former strikers have received since returning to work were the least onerous ones *available*, or even the *only* ones available. Moreover, the General Counsel did not show that the post-strike assignments were unnecessary to the Respondent's operations or otherwise prove that the assignments were invented to punish the returning strikers. On the record in this case I cannot conclude that the Respondent assigned the returning strikers to positions that were more onerous or rigorous than other available positions, much less that it made such assignments for discriminatory reasons.

For these reasons, I conclude that the allegation that the Respondent violated Section 8(a)(5) and (1) by discriminatorily assigning the returning strikers to more onerous and rigorous working conditions should be dismissed.[49]

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[47] My view that the employees made an unconditional offer to return on July 10 is not altered by the fact that later, on August 22, the employees refused the Respondent's demand that the Union's president (J. Figueroa) be excluded from the discussions regarding the details of their return. It is not for the Respondent to decide what official of the collective bargaining representative will speak on behalf of the unit, and the employees' offer did not become conditional simply because they insisted on their chosen representative. See supra, fn. 19. It is unlawful for an employer to pressure former strikers to accept an unfair labor practice as a condition of returning to work. See supra at fn. 45.

[48] See *Sunol Valley Golf Club*, 310 NLRB 357, 373 (1993) (unlawful to treat returning strikers as new hires who have to complete employment applications), enfd. sub nom. *Ivaldi v. NLRB*, 48 F.3d 444 (9th Cir. 1995); *Champ Corp.*, 291 NLRB 803, 808 (1988) (Employer violated the act by requiring returning striker to "execute an application . . . and accept employment as a new employee."), enfd. 933 F.2d 688 (9th Cir. 1990), cert. denied 502 U.S. 957 (1991).

[49] This conclusion does not affect the previous finding that the Respondent has violated the Act by failing to offer the former strikers reinstatement to their pre-strike positions, or substantially equivalent positions, when such openings occurred. This is true regardless of whether the former positions were less onerous than their post-strike positions.

In its brief the Respondent argues that after the General Counsel "fully rested his case," the General Counsel was permitted "to resume with his case in order to supply the evidence needed to avoid" dismissal of the part of the case regarding allegations of more onerous working conditions. GC Br. (II) at 2–3. Contrary to the Respondent's assertion, at the time the Respondent moved to dismiss, the General Counsel made clear that it was not resting because Juarbe (director of human resources), who was being examined by the General Counsel as an adverse witness pursuant to Fed.R.Evid. 611(c), had become unavailable in the midst of his testimony, and the completion of that examination was required. I offered the Respondent the option of waiting until the General Counsel fully rested before stating the basis for the motion

Respondent's Refusal to Provide the Union with Employees' Names and Positions

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by refusing the Union's August 20, 2002, request for the names and positions of employees at the Amelia, Corujo, Muelle, and Anexo Romana facilities. An employer is required to provide information that is requested by a union and is relevant to the union's performance of its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–437 (1967). The standard for assessing relevance is a liberal, discovery-type standard. Id. at 437; see also *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).

The Respondent argues that the individuals about whom the Union was seeking information were striker replacements. This argument does not relieve it of the obligation to provide the information because the Board has repeatedly stated that a union represents striker replacements in the bargaining unit and is "presumptively entitled to the names and payroll records of bargaining unit employees, including strike replacements." *Page Litho, Inc.*, 311 NLRB 881, 882 (1993), enf. granted in part, denied in part mem. 65 F.3d 169 (6th Cir. 1995); see also *Grinnell Fire Protection Systems Co.*, 332 NLRB 1257, 1257–58 (2000); *Central Management Co.*, 314 NLRB 763, 769 and 780 (1994); *Chicago Tribune Co.*, 303 NLRB 682 (1991), enf. denied 965 F.2d 244 (7th Cir. 1992); and *Trumbull Memorial Hospital*, 288 NLRB 1429 (1988). The Respondent has forwarded no colorable basis for overriding the presumption that the Union is entitled to the information at issue here. An employer may justify the refusal to supply information about strike replacement workers by showing either "a likelihood of a clear and present danger to the employees involved," *Burkart Foam*, 283 NLRB 351, 356 (1987), enfd. 848 F.2d 825 (7th Cir. 1988), or a "clear and present danger that the information would be misused," *Page Litho, Inc.*, 311 NLRB at 882. The Respondent has shown neither here. In particular, the record did not show that the Union or the strikers had engaged in any unlawful conduct directed at the replacement workers. No replacement workers were called to testify that they had concerns about their safety, or that they would have objected to the Respondent supplying their names and positions to the bargaining representative of the unit in which they were working. I do not believe that the Respondent has shown any likelihood or danger of abuse whatsoever, and certainly it has not shown a "clear and present danger" of abuse. Thus, the Union's presumptive entitlement to the requested information regarding the striker replacements is controlling.[50]

Even if the information sought by the Union was not presumptively relevant to the representation of the strike replacements, it would still be relevant to the representation of the former strikers. In response to the Union's offer to return to work, the Respondent took the position that 15 of the former strikers did not have to be reinstated because they had been laid off during the strike due to the elimination of positions. The information request makes clear that one reason the Union is asking for the names and positions of current employees is to permit it to assess the Respondent's assertion that positions had been eliminated. The Union was entitled to the requested information for that purpose. See *Burkart Foam*, supra at 356 ("[U]nions are entitled to the names, addresses, and seniority dates of strike replacements as well as information relating to the reasons for terminating strikers and relating to their recall."). Such information was plainly relevant to the Union's performance of its statutory duties and responsibilities in representing the 15 former strikers who the Respondent had laid off and, therefore, the Respondent was legally required to provide that information.

In a letter dated November 27, 2002, the Respondent provided some of the information sought by the Union. The Respondent's November 27 letter supplied the names of the employees, identified the facilities where they were working, and stated that all were "production" employees, but it did not identify the employees' *positions*, as requested by the Union.[51] The Union is entitled to information regarding the positions occupied by these bargaining unit employees for the purposes discussed above, and the Respondent's refusal to provide that information is in violation of the Act. Moreover, the information that was contained in the November 27 letter was provided after a delay of 3 months. The Respondent has provided no evidence showing that the information requested was voluminous or particularly difficult or time-consuming to gather. I conclude that the Respondent delayed unreasonably by waiting 3 months to supply the information that it communicated in its November 27 letter. An employer violates the Act when it unreasonably delays providing information to which a collective bargaining representative is entitled. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989).

I find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing the Union's August 20, 2002 request that it state the positions of employees at the Amelia, Corujo, Muelle, and Anexo Romana facilities, and by unreasonably delaying the provision of the other information requested about those employees.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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to dismiss, but the Respondent chose to press the motion during the period that Juarbe was unavailable. At any rate, in light of my conclusion that the allegation regarding more onerous working conditions should be dismissed, the Respondent's contention is moot.

[50] Even assuming that the Union's entitlement to the information did not arise until the strike ended, that would not change the result here since the record shows that the strike had ended at the time of the information request. The Union requested the information on August 20, well after the Union abandoned the strike by making an unconditional offer to return to work. Moreover, even after the former strikers actually returned to work in late October, the Respondent continued to withhold information requested regarding the positions of employees. Thus the Respondent withheld the information after it was clear that the strike had ended, and the presumption in favor of disclosing the requested information was triggered.

[51] For the reasons discussed earlier, I reject the Respondent's contention that the unit employees did not have "positions." See supra at fn. 26.

2. The Union is labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) by discriminatorily refusing to consider Domingo Garcia's January 2002 request for leave because he participated in protected activity by striking.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by discontinuing its payments to the medical plans for Jose Rossner Figueroa and Alberto Ortiz Serrano because the employees engaged in protected activity by striking.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by implementing the February 27 layoff without giving the Union adequate notice and reasonable opportunity to bargain.

6. The Respondent violated Section 8(a)(3) and (1) of the Act by reducing the wages of the returning strikers.

7. The Respondent has violated Section 8(a)(3) and (1) of the Act by treating the returning strikers as new hires, and denying them reinstatement to their previous positions or substantially equivalent positions when such positions became available after the employees made their unconditional offer to return to work.

8. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing the Union's August 20, 2002 request that it state the positions of employees at the Amelia, Corujo, Muelle, and Anexo Romana facilities, and by unreasonably delaying the provision of the other information requested about those employees.

9. The Respondent was not shown to have committed the other unfair labor practices alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. With respect to the Respondent's unlawful failure to provide the Union with notice or an opportunity to bargain over the February 27 layoff, I find that a full backpay remedy is appropriate. The Board has held that "the traditional and appropriate Board remedy for an unlawful unilateral layoff based on legitimate economic concerns includes ordering the employer to bargain over the layoff decision and the effects of that decision, reinstating the laid-off employees, and requiring the payment to the laid-off employees of full backpay, plus interest, for the duration of the layoff*." Ebenezer Rail Car Services, Inc*., 333 NLRB 167 fn. 5 (2001); see also *L.W.D., Inc.*, 335 NLRB 241 fn. 2 (2001), enf. granted in part, order set aside in part 76 Fed. Appx. 73 (6th Cir. 2003), and *Lapeer Foundry & Machine*, 289 NLRB 952, 955–956 (1988). Since the employees were engaged in a strike at the time the layoff was instituted, the backpay period in this case should begin to run at the time of the Union's unconditional offer to return to work on July 10, 2002, not as of the time the layoff was initiated on February 27.

With respect to the unlawful reduction in the wages of the former strikers, I find that the former strikers are entitled to backpay for the difference between what they have actually been paid since returning to work with the Respondent and the wages they were being paid prior to the strike plus any general increases. As discussed above, the record shows that when the Respondent reemployed the former strikers, it discriminatorily paid them significantly lower wages than it did other hirees who had not participated in the strike. There is uncertainty, however, about how much the Respondent actually would have paid the former strikers if it had not discriminatorily reduced their wages. One cannot say with confidence that the Respondent would have paid them the same wages paid to the nonstrikers newly hired during the relevant time frame since the former strikers had specialized skills, experience and training relevant to the Respondent's operation. Although the matter is not free from doubt, there is some basis for believing that, if not for its unlawful motivation, the Respondent would have evaluated the returning strikers' skills, experience and training as it did before the strike, and offered them their prestrike wages, plus any general increases. The Board is not infrequently faced with situations where it is impossible to know with certainty what would have happened in the absence of an employer's unfair labor practices, and in such situations the Board has broad discretion to devise a remedy that effectuates the purposes of the Act. *International Paper Co.*, 319 NLRB 1253, 1278 (1995), enf. denied 115 F.3d 1045 (D.C. Cir. 1997); see also *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977); *NLRB v. Carpenters Local 180*, 433 F.2d 934, 935 (9th Cir. 1970). Under such circumstances, the backpay claimant should receive the benefit of any doubt rather than the respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved. *Weldun International, Inc.*, 340 NLRB 666, 668 (2003); *La Favorita, Inc.*, 313 NLRB 902, 903 (1994), enfd. 48 F.3d 1232 (10th Cir. 1995). Since the uncertainty about what the Respondent would actually have paid the returning strikers was created by the Respondent's own unlawful conduct, that uncertainty should be resolved against the Respondent, not against the victims of the unlawful conduct. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946); see also *International Paper Co.*, supra at 1278 (same).

All backpay provided by my recommended order should be reduced by the amount of net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and increased by interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[52]

ORDER

The Respondent, Pan American Grain Co., Inc., and Pan American Grain Manufacturing Co., Inc., Guaynabo, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[52] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discriminatorily refusing to consider Domingo Garcia's January 2002 request for leave because he engaged in protected activity by striking.

(b) Discontinuing its payments to the medical plans for Jose Rossner Figueroa and Alberto Ortiz Serrano because employees engaged in protected activity by striking.

(c) Laying off unit employees without first giving adequate notice of its intention to do so to the Union and affording the Union an opportunity to bargain in good faith over the layoff and its effects.

(d) Discriminatorily reducing the wages of the former strikers because they engaged in a strike or other protected activity.

(e) Treating the former strikers[53] as new hires and denying them reinstatement to their prestrike positions or substantially equivalent positions when such positions become available.

(f) Refusing the Union's request for a statement of the positions of employees at the Respondent's Amelia, Corujo, Muelle, and Anexo Romana facilities, and unreasonably delaying the provision of information relevant to the Union's bargaining responsibilities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Consider Domingo Garcia's January 2002 request for leave and provide him with backpay for any paid leave that he requested and for which he had accrued the necessary benefit.

(b) Make Jose Rossner Figueroa and Alberto Ortiz Serrano whole by reimbursing them for any losses that occurred as a result of the Respondent's unlawfully discontinuing it payments to their medical plans.

(c) On request, bargain with the Union concerning the decision to lay off employees on February 27, 2002, and the effects of that decision.

(d) Reinstate the employees laid off on February 27, 2002,[54] and make them whole, in the manner set forth in the remedy section of the decision, for loss of pay and other employment benefits suffered as a result of its unlawful conduct.

(e) Treat the former strikers as persons who have remained employees since the start of the strike and provide them with reinstatement to their previous positions, or substantially equivalent positions, that have or will become available subsequent to the unconditional offer to return to work on July 10, 2002.

(f) Make the former strikers whole for any loss of earnings and/or other benefits that they suffered as a result of the discriminatory reduction in their wages and their denial of reinstatement in the manner set forth in the remedy section of the decision.

(g) Immediately furnish the Union with the names of all employees working for the Respondent in the appropriate unit, as well as a statement of the specific position (e.g., welder, electrician, mechanic, pellet mill operator, batcher, mixer) held by each employee, as requested by the Union in its letter of November 27, 2002.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at all of its facilities in Guaynabo, Puerto Rico, and Bayamon, Puerto Rico, in English and Spanish, copies of the attached notice marked "Appendix."[55] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2002.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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[53] By "former strikers" I refer to the 41 individuals employees listed above in fns. 31 and 32, with the exception of Geovanni Perez Vellez, for whom the General Counsel is no longer maintaining this claim.

[54] These are the individuals listed supra in fn. 31.

[55] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."